

No. 16317 ✓

See Also
3104

United States
Court of Appeals
for the Ninth Circuit

GEORGE J. TOWLE and FRED GEORGE, Individually and as Co-partners Doing Business as TOWLE-GEORGE TURKEY LOG COMPANY, Also Known as TOWLE FOOD PRODUCTS, CO., a Partnership,

Appellants,

vs.

NORBEST TURKEY GROWERS ASSOCIATION, a Corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

FILED

JUN - 3 1959

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court for the
Northern District of California, Southern Division

Civil Action No. 35653

GEORGE J. TOWLE and FRED GEORGE, In-
dividually and as Co-partners Doing Business
as TOWLE-GEORGE TURKEY LOG COM-
PANY, Also Known as TOWLE FOOD
PRODUCTS CO., a Partnership,

Plaintiffs,

vs.

NORBEST TURKEY GROWERS ASSOCIA-
TION, a Corporation,

Defendant.

COMPLAINT

First Claim

1. Jurisdiction of this complaint is based upon United States Code, Title 28, Section 1332, the controversy being between citizens of different states and the matter in controversy exceeding the sum or value of \$3,000.00, exclusive of interest and costs, all as hereinafter more fully appears.

2. On or about June 1, 1953, Fred George and George J. Towle became associated as general partners under the firm name of Towle-George Turkey Log Company for the purpose, among others, of promoting for profit the manufacture, sale and distribution of a food product hereinafter referred to as "Turkey Log." The principal place of business

of the partnership has been and still is located at the office of George J. Towle at 2710 Mount Diablo Boulevard, Walnut Creek, California. Said partnership has sometimes been known under the firm name and style of "Towle Food Products Co." Said partnership is hereinafter referred to as "the partnership."

3. George J. Towle is a citizen of the State of California and resides in Walnut Creek, California.

4. Fred George is a citizen of the State of California and is temporarily located at Fort Belvoir in the State of Virginia.

5. Norbest Turkey Growers Association is a corporation duly organized and existing under the laws of the State of Utah and has a place of business at 757 Bryant Street in the City and County of San Francisco, State of California.

6. On or about May 25, 1954, Norbest owned an inventory of approximately 190,000 pounds of turkey logs, which said turkey logs were in storage in various warehouses throughout the United States.

7. On or about May 25, 1954, Norbest agreed to sell to George J. Towle and George J. Towle agreed to purchase from Norbest the inventory of said turkey logs then owned by Norbest under the terms and conditions of a written agreement, a copy of which is annexed to this complaint as Exhibit "A" and is incorporated herein by reference.

8. Plaintiff George J. Towle entered into said sales agreement on behalf of the partnership and with the intention that the partnership should receive all of the benefits of said sales agreement, and at all times herein mentioned George J. Towle acted and intended to act on behalf of said partnership.

9. On or about June 10, 1954, the partnership entered into an agreement with Turkey Log Corporation of Illinois, subsequently sometimes known as Towle Food Products, Inc., an Illinois corporation (hereinafter referred to as "Illinois"), wherein the partnership agreed to sell to Illinois and Illinois agreed to purchase from the partnership the said 190,000 pounds of turkey logs, more or less, under the terms and conditions set forth in a written agreement, a copy of which is annexed to this complaint as Exhibit "B" and is incorporated herein by reference.

10. Between May 25, 1954, and July 22, 1954, Towle authorized Norbest to ship some of said turkey logs to Illinois on an open account basis and the partnership billed Illinois for the turkey logs thus shipped.

11. On or about July 22, 1954, the arrangement was changed to the extent that George J. Towle authorized Norbest to ship the turkey logs directly to Illinois and to collect from Illinois the purchase price which Illinois had agreed to pay the partnership and to credit the account of George J. Towle

with the credit representing the difference between the price Towle had agreed to pay Norbest and the price that Illinois had agreed to pay the partnership. This authorization was contained in a writing, received by Norbest from George J. Towle, dated July 22, 1954, the pertinent portion of which provides as follows:

“Mrs. Towle and I are planning on leaving for Europe the first part of August by which time I had hoped that the agreement between your company and the Towle Food Products, Inc., of Chicago and myself would have been completed. Inasmuch as I will not be here at the termination of the contract it would help considerably if you would allow me to have the Towle Food Products, Inc., of Chicago pay you direct rather than their paying me and me paying you. To simplify this, it would probably be easier if you were to invoice the Towle Food Products of Chicago direct on the basis of \$1.05 a pound, f.o.b. Chicago, and crediting my account on the basis of \$.99 per pound with the \$.95 per pound retroactive figure to be credited at the proper time. You, in turn, could pay this office, Towle Manufacturing Co. of Walnut Creek, whatever credits accumulate where they will be deposited in my bank.

“We will not be returning from Europe until the middle of October and I would like to have some satisfactory means of payment between our companies which I am sure you will be agreeable to.”

12. Thereafter, it became apparent that Illinois was delinquent in maintaining its accounts current.

13. On July 29, 1954, the arrangement was again altered and Norbest was authorized to ship turkey logs to Illinois on a sight draft bill of lading basis, the first such shipment so authorized being a shipment of 500 cases (to wit: 21,353 pounds and 13 ounces) of said turkey logs and at a price of \$1.18 a pound.

14. On July 30, 1954, Norbest, by a writing, accepted the foregoing proposals and stated:

“We observe your request to bill at \$1.18 for less than carload and at \$1.15 for carloads. We will be glad to follow your instructions, and at such time as a credit accrues to you, we will forward the money to your organization at Walnut Creek, California.

“I appreciate your calling me today, and I hope that the money on the turkeys now billed will be in to us early next month. I would suggest that if the turkey logs are not all billed by the tenth, that they be transferred over and we will bill them to you.”

15. On August 3, 1954, Towle gave Norbest additional instructions concerning the shipment and payment of said turkey logs. These instructions in writing provided:

“As for future deliveries I think that the sight draft payable to Norbest is the only solution to insure prompt payment.”

16. On August 6, 1954, Norbest, by letter, acknowledged receipt of said new instructions. In this letter Norbest acknowledged receipt of the letter of August 3, 1956, and observed that the lot of turkey logs "must be delivered and paid for as previously stated as we wish to clean up the present inventory."

17. Thereafter, on August 10, 1954, representatives of Norbest, the partnership and Illinois had a conference at Salt Lake City, Utah. At this conference Illinois made arrangements to pay substantial amounts on the balance owing to the partnership on the turkey logs delivered prior to August 3, 1954, and paid said amounts by August 10, 1954. At this meeting it was orally agreed and reaffirmed that all shipments subsequent to July 31, 1954, were to be on a sight draft bill of lading basis.

18. In the interim and during the period from May 25, 1954, to and including July 31, 1954, Norbest delivered to the partnership and/or to Illinois, on order of the partnership, a total of 87,966 pounds and 12 ounces of turkey logs. Norbest received from Towle and the partnership and from Illinois sums totaling \$92,116.13 for said 87,996 pounds and 12 ounces of turkey logs, said payments having been completed by a payment made by Illinois on August 10, 1954. The partnership and Towle owed Norbest for said 87,996 pounds and 12 ounces of turkey logs the total sum of \$87,116.90. As a consequence, on August 10, 1954, Norbest became in-

debted to the partnership and to Towle in the sum of \$4,999.23, no part of which has ever been paid.

19. On August 5, 1954, Norbest delivered 17,-872 pounds of turkey logs to Illinois, said turkey logs having been delivered on August 16, 1954, to Kansas Cold Storage Company, Wichita, Kansas. Norbest received for said turkey logs the sum of \$20,892.71. The partnership and Towle owed Norbest the sum of \$17,604.18 for said turkey logs. As a consequence, on August 16, 1954, Norbest became indebted to the partnership and Towle for the sum of \$3,378.53, no part of which has ever been paid.

20. Said delivery of August 16, 1954, brought the total pounds of turkey logs thus far delivered and paid for to an amount in excess of 100,000 pounds, to wit: The total of 105,778 pounds 12 ounces. As a consequence, Norbest thereupon and on August 16, 1954, became indebted to Towle and the partnership for \$.04 a pound for said 105,778 pounds, or for a total of \$4,231.15, no part of which has ever been paid.

21. On August 25, 1954, Norbest delivered to Illinois a total of 29,510 pounds 11 ounces of turkey logs and obtained from Illinois the sum of \$30,-996.72 for said turkey logs. The partnership and Towle owed Norbest for said turkey logs the sum of \$28,035.15. As a consequence, on August 25, 1954, Norbest became indebted to Towle and the partnership in the sum of \$2,961.57. no part of which has ever been paid.

22. During the foregoing period of time and in violation of its instructions to deliver turkey logs on sight draft and at the prices stated below, Norbest delivered to Illinois the following logs, for which it was to receive the amounts set forth below:

Date	Invoice	Amount	Unit Price	Extension
Aug. 5, 1954	T-855	3,601 lbs. 13 ozs.	\$1.18	\$ 4,250.14
Aug. 6, 1954	T-858	2,317 lbs. 9 ozs.	1.05	2,433.44
Aug. 9, 1954	T-862	70 lbs. 9 ozs.	1.05	74.09
Aug. 20, 1954	T-904	142 lbs.	1.05	149.10
Aug. 20, 1954	T-905	34,530 lbs. 5 ozs.	1.05	36,256.83
Aug. 23, 1954	T-906	20,845 lbs. 13 ozs.	1.05	21,888.10
Aug. 25, 1954	T-907	925 lbs. 5 ozs.	1.05	971.58
TOTAL		62,433 lbs. 6 ozs.		\$66,023.28

23. Norbest was instructed to deliver said turkey logs totaling 62,433 Lbs. 6 Ozs. on a sight draft basis, 3,601 Lbs. 13 Ozs. thereof at the rate of \$1.18 per pound and the balance at the rate of \$1.05 per pound. Norbest would have realized a total amount of \$66,023.28 if it had followed its instructions. The partnership and Towle had agreed to pay Norbest the sum of \$59,311.71 for said turkey logs. Norbest failed to follow its instructions and delivered said turkey logs on credit. Illinois failed to pay Norbest the said sum of \$66,023.28, but paid Norbest only \$43,956.83 for said turkey logs.

As a consequence, in August, 1954, the partnership and Towle were damaged on the failure of Norbest to follow its instructions and Norbest became indebted to the partnership in the amount of \$6,711.57, no part of which has been paid.

24. George J. Towle, on behalf of himself and on behalf of the partnership, has demanded payment of the sums due to the partnership and Towle from Norbest, and Norbest has refused such payment.

25. The reasonable attorneys fees required to enforce the performance of the contract in which Norbest is in default as recited above is \$7,500.00.

Wherefore, plaintiffs demand judgment against Norbest as follows:

A. The sum of \$4,999.23, plus interest thereon at the rate of 6% per annum from August 10, 1954;

B. The sum of \$3,378.53, plus interest thereon at the rate of 6% per annum from August 16, 1954;

C. The sum of \$4,231.15, plus interest thereon at the rate of 6% per annum from August 16, 1954;

D. The sum of \$2,961.57, plus interest thereon at the rate of 6% per annum from August 25, 1954;

E. The sum of \$6,711.57, plus interest thereon at the rate of 6% per annum from August 25, 1954;

F. Reasonable attorneys fees in the amount of \$7,500.00;

G. Costs and disbursements; and

H. Such other and further relief as may seem meet and just to the Court.

Alternative Claim

26. This claim is an alternative to the claim set forth in paragraphs 1 to 25 of this complaint.

27. Plaintiffs reallege and adopt by reference the allegations set forth in paragraphs 1 to 17, both inclusive, of this complaint.

28. In accordance with the foregoing arrangement, Norbest sold to the partnership and to Towle and Towle and the partnership purchased from Norbest 197,722 pounds 15 ounces of turkey logs for which Towle and the partnership agreed to pay to Norbest the total sum of \$187,836.79.

29. Under the foregoing arrangement Norbest agreed to ship certain of said turkey logs and to credit the amount so received first to the amounts which Towle and the partnership owed to Norbest and to remit the balance to the partnership and to Towle.

30. In performance of its duties with respect to shipments totaling 135,289 pounds of turkey logs, Towle and the partnership paid Norbest \$5,657.48 and Illinois paid Norbest \$138,438.08, resulting in a total of \$144,095.56, which was paid Norbest on said shipments, but in violation of its duty, Norbest failed to remit any portion of said amount to the partnership and/or to Towle.

31. Norbest shipped the balance of said turkey logs, to wit: 62,433 pounds 6 ounces of said turkey logs, to Illinois, all as are itemized in paragraph

22 above, incorporated herein by reference. In violation of its duties and its instructions, as pleaded in paragraphs 13 and 15 above, Norbest shipped said logs on an open account basis rather than on a sight draft bill of lading basis, as required by the arrangements between the partnership and Towle, on the one hand, and Norbest, on the other. Illinois did not make full payment for said 62,433 pounds and 6 ounces of turkey logs, but paid Norbest therefor only the sum of \$43,956.83.

32. If Norbest had followed its instructions in shipping said 62,433 pounds 6 ounces of said turkey logs, Norbest should have received \$66,023.28 for said turkey logs and Norbest then would have received on account of the entire purchase of the entire lot of turkey logs the sum of \$144,095.56 pleaded in paragraph 30, plus the sum of \$66,023.28 pleaded herein, for a total of \$210,118.84.

33. As a consequence of the failure of Norbest to follow its instructions, the partnership and Towle have been damaged in the net amount of \$22,282.05, said amount being the difference between the sum of \$210,118.84 which Norbest would have realized had it followed its instructions and the amount of \$187,836.79 for which Towle and the partnership were liable to Norbest on account of the purchase price of said turkey logs.

34. Plaintiffs incorporate herein by reference paragraphs 24 and 25 of this complaint.

Wherefore, plaintiffs demand judgment against

Norbest in the amount of \$22,282.05 plus interest thereon at the rate of 6% since August 25, 1954, plus reasonable attorneys' fees in the amount of \$7,500.00, plus their costs and disbursements herein incurred, together with such other and further relief as may seem just to the Court.

/s/ EDGAR B. STEWART,

/s/ HOWARD H. BELL,

/s/ CARL HOPPE,

Attorneys for Plaintiffs.

BREED, ROBINSON &
STEWART,

Of Counsel for Plaintiffs.

EXHIBIT A

Sales Agreement

This Agreement executed between Norbest Turkey Growers Association of Salt Lake City, Utah, as "Seller," and George Towle, of Walnut Creek, California, as "Buyer";

In consideration of the covenants herein contained, Seller agrees to sell and Buyer to purchase 190,000 pounds of Turkey Logs upon the following terms and conditions:

1. Buyer will purchase from Seller 190,000 pounds of Turkey Logs at the price of 99c per

pound, F.O.B. Sacramento, California, or Chicago, Ill.

2. Turkey Logs will be withdrawn from storage in lots of 10,000 pounds or more each week commencing;

3. Buyer agrees to pay to Seller at Salt Lake City, Utah, for such Turkey Logs as and when the same are withdrawn from storage at the rate of 99c per pound. After 100,000 pounds have been so withdrawn from storage and paid for by Buyer, Seller will issue to Buyer a credit of 4c per pound upon said 100,000 pounds, and the balance of 90,000 pounds will be paid for at the agreed price of 95c per pound.

4. Buyer agrees to purchase and pay for the entire 190,000 pounds on or before August 1, 1954.

5. In the event of default in the withdrawals as agreed upon or in payment as prescribed, Seller is granted the option to either declare the contract immediately terminated or to resort to such other remedies as may be available. In the event of such termination, notice may be given to Buyer by registered mail or personally, thereby terminating Seller's obligation to deliver any further Turkey Logs to Buyer.

6. In the event of default in performance of this contract, the defaulting party agrees to pay all costs required in enforcement, including reasonable attorney's fees.

Dated this day of, A.D. 1954.

NORBEST TURKEY
GROWERS ASSOCIATION,
Seller.

By /s/ J. R. BARRETT,
Assistant Manager.

/s/ PAUL F. LINDBERG,
Witness.

/s/ GEORGE TOWLE,
Buyer.

/s/ FRED GEORGE,
Witness.

EXHIBIT B

Agreement

Fred George (sometimes hereinafter referred to as "George"), and George J. Towle (sometimes hereinafter referred to as "Towle"), co-partners doing business under the firm name and style "Towle Food Products Co." (sometimes hereinafter referred to as "the partnership"), first party, and Turkey Log Corporation of Illinois (sometimes hereinafter referred to as "the corporation"), second party, hereby agree as follows:

The partnership has contracted to purchase from Norbest Turkey Growers Association (sometimes hereinafter referred to as "Norbest"), one hundred

ninety thousand pounds of processed turkey meat, customarily and hereinafter designated as "turkey logs," and to pay for the same not later than August 1, 1954, with the further provision, however, that during the period prior to August 1, 1954, said partnership from time to time shall take delivery of such turkey logs in minimum quantities of ten thousand pounds and shall pay for the same upon taking such deliveries.

Said one hundred ninety thousand pounds of turkey logs are presently in existence and said logs now existing are the only source of supply for delivery by Norbest to the partnership pursuant to the provisions of said agreement between Norbest and the partnership, and thus are the only source of supply of such logs for the purpose of this agreement between the corporation and the partnership.

The partnership agrees to sell to the corporation and the corporation agrees to purchase from the partnership said one hundred ninety thousand pounds of turkey logs, more or less, upon the following terms and conditions:

1. Said lots will be delivered to the corporation f.o.b. Chicago, Illinois.

2. The price of said lots as so delivered shall be \$1.05 per pound, payable as follows:

- (a) The total purchase price for said one hundred ninety thousand pounds shall be payable on or before August 1, 1954.

(b) The corporation shall be privileged to take delivery of such logs in minimum quantities of ten thousand pounds at any time prior to said August 1, 1954, and in the event of such taking of delivery shall pay to the partnership forthwith the full purchase price of the logs so delivered.

3. The partnership and the individual partners hereby sell, assign and transfer to the corporation the right to use the name "Towle," either alone or in association with other words, in connection with the business and affairs of the corporation.

4. The partnership hereby sells, assigns and transfers unto the corporation one slicing machine now owned by the partnership and label design heretofore used by the partnership and designed by J. Walter Thompson.

5. In consideration of the transfers mentioned in the preceding paragraph hereof, the corporation shall pay to the partnership the further sum of \$2,000, payable \$1,000 on the execution hereof and \$1,000 on or before October 1, 1954.

6. In further consideration of the premises the corporation shall pay to Towle (individually and not as a partner in said partnership) royalties as follows:

(a) Without limit as to time, a royalty of 1c for each pound of turkey (whether in form of turkey log or in other form, and regardless of label used) hereafter sold by the corporation; provided, no such royalty shall be paid with respect to the

one hundred ninety thousand pounds referred to in this agreement.

(b) Without limit as to time, a royalty (in an amount not yet precisely determined) on any other item sold by the corporation in connection with which item or sale the name "Towle" is used. The name "Towle" shall not be used in connection with any such other item unless and until the royalty to be paid to Towle with respect to such item is precisely agreed upon; provided, however, that the parties now agree that Towle may not require such royalty to exceed 1% of the gross sales price of any such item.

(c) All royalties referred to in this agreement shall be payable to Towle monthly on or before the tenth day of each calendar month with respect to sales occurring in the preceding calendar month.

(d) All royalty payments to Towle hereunder shall be accompanied by a full and complete statement of all facts pertaining to the computation of the royalties, and Towle at any and all reasonable times shall be privileged, upon demand, to inspect all books and records of the corporation relating to matters bearing directly or indirectly upon the computation of the within-mentioned royalties.

(e) George shall have no interest in any royalties payable hereunder.

7. The corporation agrees that the aggregate royalties to be paid to Towle during a period of

twelve months next succeeding the date of this agreement shall be not less than the sum of \$5,000 and that commencing thereafter such royalties during each next succeeding twelve-month period shall not be less than the sum of \$5,000. In the event, during any such twelve-month period, such royalties in the aggregate have been less than the sum of \$5,000, then at the option of Towle to be exercised within two months following the expiration of such twelve-month period, this agreement may be terminated and except as hereinafter set forth shall become and be of no further force or effect, and in the event such option be exercised the corporation shall not thereafter use the name "Towle" in any manner whatsoever in connection with the business and affairs of the corporation; provided, however, that in the event such option be not exercised, then the right to exercise the same shall be deemed waived until such later date as there again is a deficiency with respect to one of said twelve-month periods, in the payment of the minimum royalties specified above.*

8. In the event the corporation at any time hereafter engages in any transaction resulting directly or indirectly in the transfer of this agree-

*[The following words were cancelled at the end of this paragraph: Referred to; but provided further, however, that in the event such option is at any time exercised, then the corporation nevertheless thereafter shall continue to pay to Towle in the manner above set forth said royalty of 1c per pound on all turkey sold by the corporation.]

ment, or any rights hereunder, or of its business relating to the sale of turkey in any form, or relating to the sale of any part of its business involving the use of the name "Towle," then the corporation shall disclose to the transferee the provisions of this agreement and shall cause the transferee to obligate itself in writing to continue the payment to Towle of all royalties herein referred to.

9. For the reasons mentioned in the recitals first hereinabove set forth, the corporation releases the partnership from any and all claims which the corporation otherwise might have relating to the failure of the partnership to deliver turkey logs of proper quality in the quantity hereinabove set forth so long as such failure of delivery results from the inability of the partnership to obtain delivery of such proper quality or quantity from Norbest.

10. In the event the corporation defaults in the performance of any of its agreements hereunder, it shall indemnify the partnership against and hold it harmless from all loss, cost or expense resulting from such default or connected with any action taken by the partnership for the purpose of enforcing such performance.

Dated: June 10, 1954.

GEORGE J. TOWLE,

FRED GEORGE,

D.B.A. Towle Food
Products Co.

TOWLE FOOD PRODUCTS,
INC.,

An Illinois Corporation, Successor to Turkey Log
Corporation of Illinois;

By L. EDWARD HART, JR.,
Its President, and

[Seal] LYDIA C. NIEMUTH,
Its Secretary.

[Endorsed]: Filed July 10, 1956.

[Title of District Court and Cause.]

ANSWER

Answering the Complaint herein, Defendant alleges:

First Claim

1. Admits the allegations of Paragraphs 1, 2, 3, 4, 5, 6, 7 and 10. Answering Paragraph 12, admits that it was informed that Illinois was delinquent in maintaining its accounts with Towle or the partnership current.

2. Alleges that it is without knowledge or information sufficient to form a belief as to the truth of Paragraphs 8 and 9.

3. Answering Paragraph 11, admits the existence of a letter dated July 22, 1954, from George J. Towle to Defendant, and that the quotation in said paragraph represents in part the contents of

such letter, and denies each and every other allegation contained in said paragraph. Further answering said paragraph, Defendant alleges that no agreement or arrangement existed at any time as between Defendant and George J. Towle or the Plaintiffs or either of them to pay any sum or amount to Towle or the partnership from any sums paid to the Defendant until Defendant had been paid in full for the turkey logs which Towle agreed to purchase under the terms of the agreement attached to the Complaint and marked Exhibit "A."

4. Answering Paragraph 13, admits that it was requested and authorized on or about July 29, 1954, by Towle to ship, and that on or about August 3, 1954, it did ship on a sight draft bill of lading basis a specific shipment of 600 cases (21,383 lbs., 13 ozs.) of turkey logs to purchasers from Towle for which Towle owed the sum of \$21,169.97, and that on or about August 16, 1954, it was paid the sum of \$20,982.71 which was credited on Towle's account and, except as herein admitted, denies each and every other allegation contained in said paragraph.

5. Answering Paragraph 14, admits the existence of a letter dated July 30, 1954, from Defendant to Towle and that the quotation in said paragraph represents in part the contents of such letter and, except as herein admitted, denies each and every other allegation contained in said paragraph.

6. Answering Paragraph 15, admits the existence of a letter dated August 3, 1954, from Towle

to Defendant and that the quotation contained in said paragraph represents in part the contents of such letter and, except as herein admitted, denies each and every other allegation contained in said paragraph.

7. Answering Paragraph 16, Defendant admits the existence of a letter dated August 6, 1954, from Defendant to Towle, that in this letter Defendant acknowledged receipt of the letter of August 3, 1956, and that the quotation in said paragraph represents in part the contents of such letter and, except as herein admitted, denies each and every other allegation contained in said paragraph. Further answering said paragraph, Defendant alleges that neither by the letter of August 6, 1954, nor at any other time nor in any other manner, did it receive or accept any instructions or agree to any alteration of its agreement with Towle (Exhibit "A" to the Complaint), so as to provide for or require sight draft billing in the future on all shipments of turkey logs contracted to be purchased by Towle under said agreement.

8. Answering Paragraph 17, Defendant denies that at any meeting on August 10, 1954, or at any other time there was any agreement or reaffirmance of any agreement by defendant that all shipments subsequent to July 31, 1954, were to be on a sight draft bill of lading basis.

9. Answering Paragraph 18, Defendant admits that during the period from May 25, 1954, to July

31, 1954, it delivered to Towle or Towle's purchaser, 87,996 lbs. 12 ozs. of turkey logs and that Towle or the partnership owed to Defendant the sum of \$87,166.90 for said poundage and that by, on or about August 10, 1954, Defendant had received the sum of \$92,116.13 in payment for all such poundage and other poundage delivered to August 10, 1954. Further answering said paragraph, Defendant denies each and every remaining allegation contained in said paragraph and denies that as of August 10, 1954, Defendant was or became indebted to Towle or the partnership in the sum of \$4,999.23 or in any sum or amount whatsoever. Further answering said paragraph, defendant alleges that as of August 10, 1954, Towle or the partnership was indebted to Defendant for turkey logs which Towle had agreed to purchase and to pay for, in a sum in excess of \$92,116.13 and that this amount was applied against this indebtedness.

10. Answering Paragraphs 19 and 20, Defendant admits that on or about August 5, 1954, it delivered to Towle or Towle's purchaser, 21,383 lbs., 13 ozs. of turkey logs; that on or about August 16, 1954, it received the sum of \$20,982.81 in payment for said poundage and that said deliveries brought the total poundage thus far delivered to 109,380 lbs., 9 ozs. Further answering said paragraphs, Defendant denies each and every allegation contained in said paragraphs, and denies that on August 16, 1954, it was or became indebted to Towle or the partnership in the sum of \$3,378.53 or the sum of

\$4,231.15 or in any sum or amount whatsoever. Further answering said paragraphs, Defendant alleges that as of August 16, 1954, Towle or the partnership was indebted to Defendant for turkey logs which Towle had agreed to purchase and pay for in a sum in excess of \$20,982.71 and that this amount was applied against this indebtedness.

11. Answering Paragraph 21, admits that on or about August 25, 1954, Defendant delivered to Towle or Towle's purchaser 29,510 lbs., 11 ozs. of turkey logs and that it received the sum of \$30,996.72 in payment for said poundage. Further answering said paragraph, Defendant denies each and every remaining allegation contained therein and denies that on August 25, 1954, it was or became indebted to Towle or the partnership in the sum of \$2,961.57 or in any sum or amount whatsoever. Further answering said paragraph, Defendant alleges that as of August 25, 1954, Towle or the partnership was indebted to Defendant in an amount in excess of \$30,996.72 for turkey logs which Towle had agreed to purchase and pay for and that this amount was applied against this indebtedness.

12. Answering Paragraphs 22 and 23, admits that in addition to the deliveries referred to in the preceding paragraphs of this Answer, Defendant delivered to Towle or Towle's purchaser, turkey logs in the amount of 2,317 lbs., 9 ozs. on August 6, 1954; 70 lbs. 9 ozs. on August 9, 1954; 142 lbs. on August 20, 1954; 34.350 lbs. 5 ozs. on August 20, 1954; 20,845 lbs. 13 ozs. on August 23, 1954, and

925 lbs. 5 ozs. on August 25, 1954, and that on September 17, 1954, it received the sum of \$43,956.83 representing the balance then due and owing by Towle or the partnership to Defendant for all turkey logs sold and delivered to Towle or Towle's purchasers by Defendant. Further answering said paragraphs, denies each and every remaining allegation contained therein and denies that the partnership or Towle were damaged or that Defendant was or became indebted to Towle or the partnership in August, 1954, or at any time in the sum of \$6,711.57 or in any sum or amount whatsoever.

13. Answering Paragraph 24, admits that there has been a demand by Towle for the payment of certain sums, denies that the partnership has made any demands for payment and admits that Defendant has and does now refuse to make any payments to Towle or the partnership.

14. Answering Paragraph 25, denies each and every allegation contained therein, and denies that Defendant is in default in the performance of any contract with Towle or the partnership.

Alternative Claim

15. Answering Paragraphs 27 and 34, Defendant incorporates by reference as though fully set forth herein all of the allegations contained in Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 13 and 14 of the Answer as hereinabove set forth.

16. Answering Paragraph 28, admits that Defendant sold to Towle and that Towle purchased from Defendant 197,722 lbs., 15 oz. of turkey logs for which Towle agreed to pay the sum of \$187,836.79. Further answering said paragraph, denies each and every remaining allegation contained therein.

17. Answering Paragraph 29, denies each and every allegation contained therein. Further answering said paragraph, alleges that under its contract with Towle, it was not required to remit any sum or amount of money to Towle or to the partnership until it had been paid in full for all turkey logs purchased and agreed to be purchased by Towle under said contract.

18. Answering Paragraphs 30, 31 and 32, admits that as of August 25, 1954, there had been shipped and delivered to Towle or Towle's purchasers, 197,722 lbs., 15 oz. of turkey logs and that Defendant had only been paid the sum of \$144,095.56 on account of all such turkey logs delivered and that there was then due, owing, payable and unpaid to Defendant by Towle or the partnership for said turkey logs delivered a sum in excess of \$144,095.56 against which this amount was credited and applied. Further answering said paragraphs, Defendant denies each and every remaining allegation contained in said paragraphs. Further answering said paragraphs, Defendant alleges that on September 17, 1954, the sum of \$43,956.83 representing the balance owing to it by Towle or the

partnership for all turkey logs delivered was paid and that at no time was Defendant paid any sum or amounts by any persons which were in excess of the amounts contracted to be paid and then owing to Defendant by Towle or the partnership.

19. Answering Paragraph 33, Defendant denies each and every allegation contained therein and denies that the partnership or Towle have been damaged in the sum of \$22,282.05 or in any sum or amount whatsoever.

As a First Affirmative Defense to the Complaint and Each of the Causes of Action Thereof, Defendant Alleges That:

1. Defendant has been paid only such amounts as were due and owing to Defendant by Towle or the partnership under the terms and conditions of the contract entered into between Defendant and Towle for the purchase and sale of turkey logs, said contract being attached to the Complaint herein as Exhibit "A."

As a Second Affirmative Defense to the Complaint and Each of the Causes of Action Thereof, Defendant Alleges That:

1. On or about September 17, 1954, it was orally agreed by Plaintiffs and George J. Towle that all of the obligations existing between the parties with regard to the purchase by Towle and the sale by Defendants of turkey logs had been fully and com-

pletely performed, and that in full accord and satisfaction of the obligations of Towle and the partnership to Defendant, and Defendant's obligations to Towle, the sum of \$43,956.83 was paid to Defendant on September 17, 1954.

As a Third, Separate, Further and Affirmative Defense to the Complaint and Each of the Causes of Action Thereof, Defendant Alleges That:

1. The Complaint fails to state a cause of action against Defendant upon which relief can be granted.

As a Fourth, Separate, Further and Affirmative Defense to the Complaint and Each of the Causes of Action Thereof, Defendant Alleges That:

1. On or about August 6, 1954, and in response to the written suggestion of George J. Towle and as an accommodation to him, Defendant agreed that, with regard to turkey logs thereafter delivered to Towle Food Products, Inc., as a purchaser from George J. Towle and which George J. Towle was obligated to purchase and pay for under his agreement with Defendant, it would on behalf of George J. Towle, invoice Towle Food Products, Inc., directly at a price of \$1.05 per pound, representing the purchase price to be paid by Towle Food Products, Inc. to George J. Towle, and that any moneys received would be credited against Towle's indebtedness to Defendant. Defendant further

agreed that as soon as all turkey logs to be purchased by Towle under its contract with Defendant were sold and paid for, any funds remaining would be remitted to Towle Manufacturing Company. Defendant agreed to do this although not required to do so by the terms of its written agreement with Towle.

2. Defendant received no consideration from George J. Towle or the Plaintiffs in connection with or for this agreement.

3. Defendant thereafter as an accommodation to Towle or the partnership invoiced Towle Food Products Co. at Chicago, Illinois, directly for all deliveries of turkey logs made to it at a price of \$1.05 per pound. Although demand was made, Towle Food Products Co. failed and refused to pay such invoices in full and paid to Defendant only such total amount as was equal to the sums due and owing to Defendant from George J. Towle or Towle Manufacturing Company, the partnership, at a price of 95 cents per pound as set forth in the agreement between Defendant and George J. Towle. Defendant is advised and upon information and belief alleges that Towle Food Products, Inc.'s failure to pay the additional sums as invoiced was upon the basis that it has and claims a valid and legal defense against any additional amounts demanded from it by George J. Towle or Towle Manufacturing Company, the partnership, and that it has paid to Towle and the partnership all sums due and owing to them.

4. Defendant alleges that, if any sums or amounts are due and owing to Plaintiffs for said turkey logs, such amounts are owing by others than Defendant. Defendant is informed and believes that Plaintiffs have endeavored to recover the sums herein claimed from Towle Food Products, Inc., and have thereby acknowledged their claims to be one only as against Towle Food Products, Inc.

As a Fifth, Separate, Further and Affirmative Defense to the Complaint and Each of the Causes of Action Thereof, Defendant Alleges That:

1. Defendant incorporates herein by reference, as though fully set forth herein, all of the allegations contained in Paragraphs 1, 2, 3 and 4 of its Fifth Affirmative Defense as above set forth.

2. The action is barred by the statutes of fraud, being Section 25-5-4 (2) Utah Code Annotated, 1953, which provides as follows:

“25-5-4. Certain agreements void unless written and subscribed—In the following cases every agreement shall be void unless such agreement, or some note or memorandum thereof, is in writing subscribed by the party to be charged therewith: * * * (2) Every promise to answer for the debt, default or mis-carriage of another.”

Wherefore, Defendant prays that Plaintiffs' Complaint herein be dismissed and that Defendant be awarded its costs of suit, together with reason-

able attorneys' fees and such other and further relief as to the Court may seem proper.

GARFIELD O. ANDERSON,
EDWARD J. RUFF,
THELAN, MARRIN, JOHN-
SON & BRIDGES,

By /s/ EDWARD J. RUFF,
Attorneys for Defendant.

Of Counsel:

HARRY D. PUGSLEY,
PUGSLEY, HAYES & RAMPTON.

[Endorsed]: Filed October 2, 1956.

[Title of District Court and Cause.]

MEMORANDUM FOR JUDGMENT

This is an action for an alleged breach of an agency agreement. From the evidence the Court concludes that the defendant did not violate its understanding with plaintiff. The evidence that credit could not be extended by the agent was ambiguous, and therefore not persuasive. From all of the evidence the Court concludes that defendant had authority, either express or implied, to act as it did.

Judgment, therefore, is awarded to defendant with costs.

Counsel for defendant shall prepare and present findings, conclusions and a judgment.

Dated: July 3, 1958.

/s/ OLIVER J. CARTER,
United States District Judge.

[Endorsed]: Filed July 7, 1958.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having come on regularly for trial on June 4, 1958, before the Court sitting without a jury, all parties being present and represented by counsel, and both sides having completed their presentation of oral and documentary evidence with respect to the issues herein, and the Court having heard and considered the oral and written arguments of and authorities cited by counsel for the respective parties, and being fully advised in the premises, makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

I.

Plaintiffs George J. Towle and Fred George are residents and citizens of the State of California, and plaintiff Towle-George Turkey Log Company,

also known as Towle Food Products Co. (hereinafter referred to as "the partnership"), is a partnership composed of George J. Towle and Fred George and doing business in the State of California.

II.

Defendant is a corporation duly organized and existing under and by virtue of the laws of the State of Utah.

III.

On May 25, 1954, George J. Towle, acting for and on behalf of the partnership, agreed in writing (Pl. Ex. 4) to purchase approximately 190,000 pounds of turkey logs from defendant in lots of 10,000 pounds or more at a price of 99 cents per pound to be paid upon taking delivery and to purchase and pay for the entire amount of these turkey logs on or before August 1, 1954; after 100,000 pounds had been delivered and paid for, the partnership was to receive a credit of 4 cents per pound on these 100,000 pounds and the balance of the approximately 190,000 pounds was to be paid for at 95 cents a pound.

IV.

On June 10, 1954, the partnership agreed in writing (Pl. Ex. 6) with Turkey Log Corporation of Illinois, an Illinois corporation (hereinafter referred to as "the Illinois corporation"), to sell all of the turkey logs, which it was purchasing from defendant, to the Illinois corporation f.o.b. Chicago in minimum quantities of 10,000 pounds at a price of \$1.05 per pound to be paid at the time of taking

delivery, with the entire purchase price payable on or before August 1, 1954.

V.

Thereafter and up to August 10, 1954, plaintiffs issued instructions to defendant with regard to shipments to be made by it to the Illinois corporation or its purchasers, invoiced the Illinois corporation for such shipments on open account, except in those instances where the Illinois corporation specifically requested that shipment be made sight draft bill of lading, and from time to time received payments from the Illinois corporation on the basis of such invoices or sight drafts. As each shipment was made by defendant on orders from the partnership, defendant invoiced the partnership and received payments from it on the basis of such invoices or in some cases directly from the consignee where the Illinois corporation had specifically requested sight draft shipment. Defendant in all instances followed plaintiffs' instructions with regard to shipments and billing.

VI.

On or about July 22, 1954, George J. Towle on behalf of the partnership inquired of defendant whether it would be willing to make shipments for the account of the partnership of the balance of the turkey logs directly to the Illinois corporation on the basis of orders issued directly to defendant by the Illinois corporation. to invoice the Illinois corporation direct on the basis of \$1.05 a pound

f.o.b. Chicago with payments to be made direct to defendant and defendant crediting the partnership's account on the basis of 99 cents per pound and with the 95-cent-per-pound retroactive figure to be credited at the proper time. This inquiry was made by Towle because he was leaving for Europe and it would be more convenient for him to have the matter handled in this way and have the Illinois corporation pay defendant direct during his absence rather than to have the Illinois corporation paying plaintiffs on the basis of invoices issued by plaintiffs and plaintiffs paying defendant on the basis of invoices issued by defendant to plaintiffs. It is not true that on or about this date any arrangement was changed as between plaintiffs or any of them and defendant.

VII.

On or about August 6, 1954, defendant for the first time advised plaintiffs that it would be willing, on behalf of the partnership, to make shipments of the balance of the turkey logs to the Illinois corporation direct, to bill the Illinois corporation at \$1.05 a pound, and to credit the partnership's account with defendant with the difference. Defendant at the same time advised the partnership that the entire amount of approximately 190,000 pounds of turkey logs had not then been delivered and paid for in accordance with the Agreement of Sale and that unless this was done by August 10, 1954, there would be no alternative but to request cancellation of the Agreement. It is not true that prior to August 6, 1954,

or at any time plaintiffs or any of them gave instructions to defendant that shipment of turkey logs to the Illinois corporation should be made only on a sight draft payable to Norbest or that on August 6, 1954, or at any time defendant acknowledged any such instructions.

VIII.

Thereafter a meeting was arranged between plaintiffs, defendant and a representative of the Illinois corporation in Salt Lake City, Utah, on August 9 and 10, 1954, and it was orally agreed between plaintiffs, defendant and the Illinois corporation that transfer of the remaining turkey logs would be made by defendant, acting on behalf of the partnership, directly to the Illinois corporation on the basis of orders issued by the Illinois corporation and that defendant would invoice the Illinois corporation directly for them at \$1.05 per pound; that the Illinois corporation would pay in full for said turkey logs by August 25, 1954; and that after all of the approximately 190,000 pounds of turkey logs had been sold and defendant had been paid for them in full, any credit which was then accrued to the partnership would be paid by defendant to the partnership. At this time plaintiffs had not taken delivery and paid for 100,000 pounds of the turkey logs and under the terms of plaintiffs' contract with defendant the entire amount for the approximately 190,000 pounds of turkey logs purchased by plaintiffs was due, owing and payable. It is not true that at this or any other

time defendant agreed or reaffirmed that all shipments were to be on a sight draft bill of lading basis only.

IX.

Defendant thereafter as agent for the partnership, and in accordance with its agreement with and instructions from the partnership and plaintiffs and not in violation of any of them, made transfers directly to the Illinois corporation on or before August 25, 1954, of the entire balance of the approximately 190,000 pounds of turkey logs purchased from defendant by the partnership and transmitted invoices or sight drafts directly to the Illinois corporation in connection with these transfers at \$1.05 per pound. All of such shipments or transfers were made in approximately the same manner as and followed approximately the same practice as plaintiffs had followed in making previous shipments or transfers from plaintiffs to the Illinois corporation. Defendant thereafter received from the Illinois corporation on account of such transfers moneys which it credited against the total amount owing to defendant by plaintiffs and the partnership for such turkey logs.

X.

It was not agreed between plaintiffs or any of them and defendant that defendant would, and at no time did plaintiffs or any of them instruct defendant to, ship or transfer the turkey logs to the Illinois corporation only on a sight draft bill of lading basis or only on a basis that would not involve the extension of any credit to the Illinois corpora-

tion, or in any manner inconsistent with or different from the manner in which defendant actually shipped said turkey logs. At no time did defendant deliver any turkey logs to the Illinois corporation in any manner which was in violation of or inconsistent with its agency for, or any instructions received by it from, plaintiffs or any of them or in violation of or inconsistent with any understanding and agreement between defendant and plaintiffs or any of them.

XI.

The Illinois corporation refused to pay to defendant the entire amount for which it had been invoiced and paid to defendant an amount sufficient only to make the total amount which defendant had received from all sources equal to the amount due from the partnership to defendant at a rate of 95 cents per pound. At no time did defendant receive from the Illinois corporation for said turkey logs or have in its possession at any particular time from any source any sum or amounts of money in excess of the amounts then owing to defendant for turkey logs purchased by plaintiffs or in excess of the total amount owing to defendant by plaintiffs at a rate of 95 cents per pound for the 197.722 pounds, 15 ounces of turkey logs purchased from defendant by the partnership. No credit at any time ever accrued to the plaintiffs for which a proper allowance has not been made.

Conclusions of Law

I.

This court has jurisdiction of this cause of action.

II.

This court has jurisdiction of the parties.

III.

Defendant agreed to act as the gratuitous agent for plaintiffs for the purposes of shipment of turkey logs to, invoicing of and receipt of funds from Turkey Log Corporation of Illinois.

IV.

Defendant did not violate any of the terms of any understanding or agreement with plaintiffs either oral or written with regard to this agency and had full authority, express or implied, to act as it did with regard to this agency.

V.

No credits ever accrued in favor of plaintiffs or any of them out of any moneys held or received by defendant in excess of the amounts owing by plaintiffs to defendant, and there never was and there is not now owing any sum of money from defendant to plaintiffs in connection with any of the transactions which were the subject of this action.

VI.

Defendant Norbest Turkey Growers Association is entitled to have and recover judgment in its favor and to recover its costs herein as against plaintiffs.

Dated: San Francisco, California, this 12th day of September, 1958.

/s/ OLIVER J. CARTER,
United States District Judge.

Not approved as to contents, but approved as to form as provided in Rule 21 of the Rules of Practice of the District Court of the United States for the Northern District of California.

/s/ CARL HOPPE,
One of the Attorneys for
Plaintiffs.

Lodged August 12, 1958.

[Endorsed]: Filed September 12, 1958.

In the United States District Court for the
Northern District of California, Southern Division
Civil No. 35653

GEORGE J. TOWLE and FRED GEORGE, In-
dividually and as Co-partners Doing Business
as TOWLE-GEORGE TURKEY LOG COM-
PANY, Also Known as TOWLE FOOD
PRODUCTS CO., a Co-partnership,

Plaintiffs,

vs.

NORBEST TURKEY GROWERS ASSOCIA-
TION, a Corporation,

Defendant.

JUDGMENT

This cause having come on regularly for trial on June 9, 1958, before the Court sitting without a jury, all parties being present and represented by counsel, and both sides having completed their presentation of oral and documentary evidence with respect to the issues herein, and the Court having entered its Findings of Fact and Conclusions of Law dated September 12, 1958, and the Court having concluded that the plaintiffs shall take nothing by reason of their complaint and that judgment shall be entered for defendant:

It Is Therefore Ordered and Adjudged that:

I.

Plaintiffs George J. Towle and Fred George, in-

dividually and as copartners doing business as Towle-George Turkey Log Company, also known as Towle Food Products Co., a partnership, shall take nothing by reason of their complaint.

II.

Judgment is hereby awarded to defendant Norbest Turkey Growers Association against said plaintiffs.

III.

Defendant shall have and recover its costs as against plaintiffs and each of them, herein and to be hereinafter taxed on notice and herein inserted by the Clerk of this Court in the sum of \$244.55.

Dated: San Francisco, California, this 12th day of September, 1958.

/s/ OLIVER J. CARTER,
United States District Judge.

Not approved as to contents, but approved as to form as provided in Rule 21 of the Rules of Practice of the District Court of the United States for the Northern District of California.

/s/ CARL HOPPE,
One of the Attorneys for
Plaintiffs.

Lodged August 12, 1958.

[Endorsed]: Filed September 12, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

George J. Towle and Fred George, individually and as co-partners doing business as Towle-George Turkey Log Company, also known as Towle Food Products Co., a partnership, plaintiffs in the above-entitled cause, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on September 15, 1958.

GEORGE J. TOWLE,
FRED GEORGE,
TOWLE-GEORGE TURKEY
LOG COMPANY,

By /s/ CARL HOPPE,
One of Their Attorneys.

[Endorsed]: Filed October 15, 1958.

United States District Court, Northern District of
California, Southern Division

No. 35,653

TOWLE, et al.,

Plaintiff,

vs.

NORBEST TURKEY GROWERS ASSN.,

Defendants.

Honorable Oliver J. Carter, Judge, Presiding.

REPORTER'S TRANSCRIPT
OF PROCEEDINGS

Appearances:

For the Plaintiff:

CARL HOPPE, ESQ.

For the Defendants:

MESSRS. THELEN, MARRIN, JOHN-
SON & BRIDGES, by

EDWARD J. RUFF, ESQ.,

MESSRS. PUGGSLEY, HAYES &
RAMPTON, by

HARRY D. PUGGSLEY, ESQ.

The Clerk: Towle, et al., versus Norbest Turkey
Growers for trial.

Mr. Hoppe: Ready for the plaintiff.

Mr. Ruff: Before we proceed, I should like to
request admission for the purpose of this case of
Mr. Harry Puggsley, a member of the Bar of Salt
Lake City.

The Court: All right. Mr. Puggsley will be admitted for the purpose of this case and for all proceedings in this case to appear on behalf of the defendant.

Mr. Ruff: Yes, your Honor.

The Court: Gentlemen, at the outset, I know the Complaint alleges jurisdictional facts, that the plaintiffs are residents of the State of California or citizens of the State of California, and the defendant is a citizen of Utah. Is there going to be any question as to diversity of jurisdiction?

Mr. Ruff: No, your Honor.

The Court: I know that no issue is raised, and you can't stipulate to the jurisdiction of the Court, but you can stipulate to the citizenship of the parties.

Mr. Ruff: That is correct.

The Court: And you will stipulate that the allegations made in the Complaint are true in that respect, then?

Mr. Ruff: Yes, your Honor.

The Court: All right. Then no proof will be [4*] required on that issue.

Mr. Hoppe: Thank you, your Honor. [5-24]

* * *

Mr. Hoppe: Plaintiffs' Exhibit 1 is the General Partnership Agreement of the Towle-George Turkey Log Corporation.

* * *

•Page numbering appearing at top of page of original Reporter's Transcript of Record.

Plaintiffs' Exhibit 2 is an Assignment of Interest in Royalties, dated June 1, 1953; and Plaintiffs' Exhibit 3 is an Amendment to the Assignment of Interest in Royalties.

The Court: They will be admitted into evidence as Plaintiffs' Exhibits 1, 2 and 3, if there is no objection.

Mr. Ruff: No, your Honor. [25]

* * *

Mr. Hoppe: As Plaintiffs' Exhibit 4, we offer in evidence the Sales Agreement between Norbest Turkey Growers Association and George Towle, dated May 25, 1954. As Plaintiffs' Exhibit 5, we offer in evidence a Sales Agreement between Norbest Turkey Growers Association and the Turkey Log Corporation of Illinois, dated May 25, 1954.

* * *

As Plaintiffs' Exhibit 6, we offer in evidence an Agreement between Fred George and George J. Towle, co-partners doing business under the firm name and style, Towle Food Products Co., and the Turkey Log Corporation of Illinois, dated June 10, 1954. As Plaintiffs' Exhibit 7, we offer in evidence an Agreement between Fred George and George J. Towle, as co-partners doing business under the name and style of Towle Food Products Co. and Turkey Log Corporation of Illinois, also dated June 10, 1954. [26]

* * *

The Court: * * * They will be admitted into evidence as Plaintiffs' Exhibits 4, 5, 6 and 7.

* * *

Mr. Hoppe: As Plaintiffs' Exhibit 8, we offer in evidence a copy of a letter dated July 22nd, 1954, from Towle Manufacturing Co. to Norbest Turkey Growers Association.

The Court: Plaintiffs' Exhibit 8 will be admitted.

* * *

Mr. Hoppe: As Plaintiffs' Exhibit 9, we offer in evidence a letter dated July 30, 1954, from Norbest Turkey Growers Association to Mr. George Towle. Towle Manufacturing Co., Inc. [27]

* * *

As Plaintiffs' Exhibit 10, we will offer in evidence a letter, a copy of a letter, dated August 3, 1954, from Towle Manufacturing Co. to L. E. Hart.

The Court: Plaintiffs' Exhibits 9 and 10 will be admitted into evidence.

* * *

Mr. Hoppe: As Plaintiffs' Exhibit 11, we offer in evidence a letter dated August 3, 1954, from Towle Manufacturing Co. to Norbest Turkey Growers Association.

The Court: Plaintiffs' Exhibit 11 will be admitted.

* * *

Mr. Hoppe: As Plaintiffs' Exhibit 12, we offer in evidence a letter dated August 6, 1954, from Norbest Turkey Growers Association to Mr. George Towle, Towle Manufacturing [28] Co., Inc.

The Court: Plaintiffs' Exhibit 12 will be admitted.

* * *

Mr. Hoppe: As Plaintiffs' Exhibit 13, we offer in evidence a copy of a letter dated August 10, 1954, from Norbest Turkey Growers Association to Mr. A. Adams, Vice-President, Towle Food Products Co.

* * *

The Court: It will be admitted into evidence as Plaintiffs' Exhibit 13.

* * *

Mr. Hoppe: As Plaintiffs' Exhibit 14, we offer in evidence a copy of a letter from Norbest Turkey Growers Association to Fred George. [29]

* * *

As Plaintiffs' Exhibit 15, we offer in evidence a copy of a letter dated September 28, 1954, from Norbest Turkey Growers Association to Mr. Clarence E. Betz, Towle Manufacturing Company, Inc.

I have got another document attached to this, and as Plaintiffs' Exhibit 16, we offer in evidence the Statement of Account, dated September 21, 1954, attached to said copy of the letter.

The Court: Plaintiffs' Exhibits 14, 15 and 16 will be admitted into evidence. [30]

* * *

As Plaintiffs' Exhibit 17, we offer in evidence a copy of a letter dated September 24, 1954, from Towle Manufacturing Company to Norbest Turkey Growers Association.

The Court: Plaintiffs' Exhibit 17 will be admitted into evidence. [31-32]

* * *

Mr. Hoppe: * * * As Plaintiffs' Exhibit 18, we offer in evidence a letter dated August 16, 1954, from Norbest Turkey Growers Association to the Kansas Cold Storage Co. together with the attached invoice; and as Plaintiffs' Exhibit 19, we offer in evidence a group of invoices totalling 14 pages.

The Court: All right. Plaintiffs' Exhibits 18 and 19 will be admitted into evidence. [33-34]

* * *

FRED GEORGE

called as a witness by the plaintiff, being first duly sworn, thereupon testified as follows:

* * *

Direct Examination

By Mr. Hoppe:

Q. Mr. George, you are one of the plaintiffs in this case? A. That is right.

(Testimony of Fred George.)

Q. And you are a resident of the State of California?
A. I am. [35]

* * *

Q. Mr. George, what is a turkey log?

A. * * * I will say turkey log was a name given a boned turkey product. The turkey is boned. The meat is cast into cylindrical form under pressure and is formed in the shape of a log.

Q. About how much does a turkey log weigh? What is its rough size?

A. Its rough size is 15 inches in length, approximately 4 and a half inches in diameter, and it weighs approximately 9 pounds.

Q. Do you know any of the officers of the Norbest Turkey Growers Association?

A. Yes; I do.

Q. Would you name some of the officers whom you do know?

A. The two that I know are Mr. Beyers, general manager, and Mr. Garrett; and that is all I think I know at the present time. I don't know their present president or vice-president. [36]

* * *

Q. Did you meet with any of the officers of Norbest Turkey Growers Association in August of 1954?
A. Yes.

Q. Where was that meeting?

A. In Salt Lake City.

Q. Do you know when in August it occurred?

(Testimony of Fred George.)

A. I met Mr. Beyers the evening of August the 9th, and again on August 10th.

Q. Was anyone else in Salt Lake City at the meeting with you during that period of time, and, if so, would you state their names?

* * *

A. Mr. Towle was the evening of the 9th; Mr. Adams of the Chicago group was with us the evening of the 9th. On the morning of the 10th, it was Mr. Adams of the Chicago group and myself. Mr. Towle was not present.

Q. Do you recall any conversations at which one or more of those persons whom you have mentioned was present during that period of time in which the question of the payment by the Chicago group for the turkey logs was discussed? [37]

* * *

A. There was conversation with Mr. Adams and Mr. Beyers regarding payment on the evening of the 9th at which I was present.

Q. What is the first conversation you can recall?

A. Well, the first conversation that I can recall regarding payment took place in the evening of the 9th, but it was between Mr. Towle and myself.

Q. Who was present?

A. No one. [38-42]

* * *

Q. (By Mr. Hoppe): Mr. George, do you recall any conversations on August 9 or August 10

(Testimony of Fred George.)

at which the question of payment for the turkey logs to be delivered after that date was discussed and at which there was present a representative of Norbest Turkey Growers Association?

A. Not on the 9th. [43]

Q. No. I said on the 9th and 10th, during that period.

A. On the 10th. I don't know that you could call it a discussion. Mr. Adams——

Q. Who was present, first, at the conversation?

A. Mr. Adams, Mr. Beyers, and myself.

Q. Where did that meeting or discussion or conference or whatever we want to call it take place?

A. In the office of Mr. Beyers, Norbest Turkey Growers Association.

Q. In Salt Lake City? A. That is right.

Q. And what occurred at that meeting?

A. Mr. Adams had received in the morning mail a check in the amount of over \$50,000. It had been mailed from Chicago to Mr. Adams at the Hotel Utah.

Q. Mr. George, I wish you would limit your testimony to what occurred at this meeting.

A. All right. What occurred at the meeting was——

Q. Yes?

A. Mr. Adams and I went to Mr. Beyers' office. Mr. Adams gave Mr. Beyers the check.

Q. In what approximate amount?

A. It was a little over \$51,000. I don't recall the exact amount. Mr. Adams countersigned the

(Testimony of Fred George.)

check and passed it to Mr. Beyers, making a [44] remark.

Q. That is?

A. Meaning, or to the effect that in his opinion that about brought him up to date.

The Court: Who said that, Mr. Adams?

The Witness: Mr. Adams.

Q. (By Mr. Hoppe): And who was it that brought up to date?

A. The Hart group.

Q. Was anything said during that conversation about the delivery or payment of the balance of the turkey logs which were still in stock?

A. Yes. Mr. Beyers told Mr. Adams that on future deliveries there would be sight draft bill of lading.

Q. Do you recall whether Mr. Adams, in the course of this conversation, made any comments along the lines of payment?

A. The comment Mr. Adams made was that that could be handled because they had just completed their own financing arrangements in Chicago.

Q. Can you recall any other conversation along the line of payment for future delivery of the turkey logs which occurred at that time?

A. I don't recall any further conversation.

Mr. Hoppe: That is all. [45]

(Testimony of Fred George.)

Cross-Examination

By Mr. Ruff:

Q. Mr. George, you did not handle any of the financial arrangements of this partnership between yourself and Mr. Towle, did you?

A. No; I did not.

Q. In other words, all of the financial arrangements, the manner of shipment, the manner of payment for the logs, the manner of transactions as between your partnership and Norbest or between your partnership and the Chicago Corporation, all those were handled by Mr. Towle?

A. That is correct.

Q. Your only relationship to the matter was in a sales capacity; is that correct, basically?

A. Well, basically, our general partnership agreement under a paragraph in there called "Duties of the Partners," Mr. Towle was to devote the major portion of his time to sales. I was to devote the major portion of my time to the procurement or manufacture of the product.

Q. I see. But, in fact, Mr. Towle handled all the financial matters?

A. That is correct.

Q. In other words, if an arrangement were to be made between your partnership and Norbest with regard to some duties of Norbest, and I am talking now about agency, that would be [46] made by Mr. Towle? A. Yes.

(Testimony of Fred George.)

Q. And you would have nothing to do with that? A. No, sir.

Q. And by the same token, if arrangements were made between your partnership and the Chicago Corporation with regard to the method of payment and that type of thing, that would be handled by Mr. Towle, and you would have nothing to do with that? A. That is correct, sir.

Q. It is the fact, is it not, that the method of handling that was followed here up to August the 10th or thereabouts was that the Norbest people would receive orders from your organization for shipment to various points; is that correct?

A. Generally, yes.

Q. And you would have in turn received those orders from Chicago after Chicago became interested in the product?

A. Likewise, generally that is the way it was intended to be.

Q. And, had you had anything to do with the arrangements that were made with the Chicago people, and I am referring specifically now to the contract that was entered into between your organization and the Chicago group, which has been introduced in evidence here as Plaintiff's Exhibit 6? [47]

* * *

A. Yes. I sat in on those negotiations leading to this contract.

* * *

(Testimony of Fred George.)

Q. And by the same token, you had to do with and were familiar with any negotiations which led to the sales agreements between Norbest and George Towle? A. Yes; I am.

Q. Now, this agreement—that has been introduced in evidence as Plaintiffs' Exhibit 4—this agreement between Norbest and George Towle was entered into in Salt Lake City in May of 1954, on or about the 25th; is that correct?

A. That is correct.

Q. At or about the same time, discussions were had, were they not, with Mr. Hart of the Chicago group making the arrangements which ultimately led to this agreement of June 10, introduced in evidence as Plaintiffs' Exhibit 6? In other words, you had discussions of whatever future arrangements were [48] going to be made with Chicago, did you not? A. That is correct.

* * *

Q. * * * I notice that in the sales agreement between Mr. Towle and the Norbest people it provided for a sales price of 99 cents per pound for 190,000 pounds with the further provision that after 100,000 pounds have been withdrawn from storage and paid for, the price would be reduced to 95 cents, retroactive on the whole amount of shipment; is that correct?

A. That is correct.

Q. Were you familiar with that?

A. I was. [49]

* * *

(Testimony of Fred George.)

Q. Mr. George, how was that meeting arranged in Salt Lake City?

A. Which meeting do you refer to, Mr. Ruff?

Q. The one you have testified to on your direct examination.

A. You mean the August meeting?

Q. Yes.

A. Yes. As I recall, I first learned that the meeting was contemplated through Mr. Towle.

Q. Yes? [50]

A. And I am not clear as to whether Mr. Towle had been advised—I believe he had been advised by the Chicago group that it might be well to have another meeting.

Q. I see.

A. And whether or not there were confirming letter—or, it could have been handled by telephone. As I recall, Mr. Towle advised me that he was stopping off in Salt Lake City on his way to New York and would be there on the 9th and wanted to know if I would be there.

Q. Is it the fact that at this time Mr. Towle was in default under his contract to Norbest because the total amount of shipments called for under his contract had not been taken; isn't that correct?

A. Well, the record would so show that, I think.

Q. Yes. At this time, at this point in time, Mr. Towle was in default under his contract?

A. I think that is correct.

Q. Now, the meeting that was had in * * * Salt

(Testimony of Fred George.)

Lake City, I assume was primarily directed toward the point of making some arrangements because Mr. Towle had made plans to vacation in Europe for a period of time; isn't that correct?

A. I think that was the main reason.

Q. In other words, it was his desire to make some [51] arrangements for the merchandising of this material while he was gone; isn't that correct?

A. I think that is correct.

Q. In that connection and with regard to the handling of the material or the method of shipment or payment, you had never used the sight draft or sight draft bill of lading from the partnership to Chicago, had you?

* * *

A. Not to my knowledge.

Q. Up to this point in time there had never been sent from the Towle organization in San Francisco to the Hart organization in Chicago any sight draft or sight draft bill of lading? It was all handled on invoice?

A. That is my understanding.

Q. Except for a few instances where the Chicago organization had specifically requested a sight draft to a third party customer? That had happened, hadn't it?

A. Yes. I think that had happened.

Q. In other words, in some instances, the Chicago organization, who was your buyer, so to speak, had requested a sight draft, for instance, to an

(Testimony of Fred George.)

organization in Independence, Missouri, or Wichita, Kansas, where a shipment was being made directly to them, and they had specifically requested a [52] sight draft; that is right, isn't it? A. Yes.

Q. And you then, in turn, passed down this order to Norbest, who followed that instruction as to those specific orders? A. Yes.

Q. Now, in this conversation that you had in Salt Lake City, isn't it a fact that the discussion that was had with regard to the sight draft bill of lading related to future shipments of that type, in other words, to third parties, and it was not concerned with shipments that were to be made directly to Chicago?

* * *

A. Well, the conversations, just as I can recall it, is just as I gave it to you awhile ago, that when Mr. Adams gave Mr. Beyers the check with the remark that he thought that just about balanced the account, Mr. Beyers, I think, sent the check out to the accounting department. The information came back, and Mr. Beyers said that he was glad to get it, and that from now on the shipments will be SDBL.

Q. The shipments would be made SDBL. Now, part and parcel of this arrangement that you made in Salt Lake City at this time contemplated the Chicago group taking over the [53] entire remaining inventory in the warehouse, did it not?

A. Yes.

(Testimony of Fred George.)

Q. In other words, that was the purpose of the meeting? Mr. Towle was in default under his contract, as you have stated, and as you may recall from some of the letters that were sent; and I particularly refer you to a letter, Plaintiffs' Exhibit 9, dated July 30, from Mr. Beyers to Mr. Towle. It states in there:

"I hope that the money on the turkeys now billed will be into us early next month. I would suggest that if the turkey logs are not all billed by the 10th that they be transferred over, and we will bill them to you."

Now, Mr. Towle wanted to make some arrangement so that this wouldn't happen while he was gone. That is true, isn't it? A. That's right.

Q. And, so the intent and purpose of this meeting was to arrange for a complete transfer of this inventory in the warehouses from the Norbest people over to the Chicago group? Now, that is what was intended, was it not?

A. Well, I had nothing to do with the negotiations, and I can only pass judgment on this. I haven't seen that letter until this case came up here.

Q. You mean you haven't seen it until [54] today?

A. I saw it just a few days ago after I reached California. I never saw it before then.

* * *

Q. Now, so I may have your language clear, you say that Mr. Beyers told Adams that on future

(Testimony of Fred George.)

deliveries there would be sight draft bill of lading; is that correct?

A. It would be a SDBL basis.

Q. Did he say future deliveries to Chicago directly?

A. I don't think that was said directly. In other words, what he said was that on future deliveries there would be sight draft bill of lading, [55] SDBL

* * *

Redirect Examination

By Mr. Hoppe:

Q. Mr. George, with regard to your testimony concerning the duties which you had for the partnership, before this meeting which you had with Mr. Adams and with Mr. Beyers on the 10th, before that meeting, had Mr. Towle given you any instructions as to what should be done at the meeting with regard to payment for the turkey logs?

Mr. Ruff: Object to that on the same grounds. It is hearsay, so far as any instructions given by Mr. Towle to Mr. George.

Mr. Hoppe: He opened it, your Honor, when he went into the duties which Mr. George had.

Mr. Ruff: If the Court please, my examination of the witness was with regard to his general familiarity, business background, and so forth, not in regard to this limited issue of instructions given by Mr. Towle to him as to this meeting.

(Testimony of Fred George.)

Mr. Hoppe: You asked him about that, counsel. You asked: In your duties for the partnership, Mr. Towle handled all of the financial matters. So, you opened up this line of testimony.

Mr. Ruff: I will submit the matter to your Honor.

The Court: I don't see that he particularly opened up [56] this line. I know the testimony, Mr. Hoppe, but my inclination would be to sustain the objection as it presently stands, but I realize that in the question of redirect examination, any field that is opened by cross is opened for you to go farther, but I don't see that that phase of it is opened.

Mr. Hoppe: Well, I may ask the question under Rule 43, your Honor. It won't be very long.

The Court: This witness is your own witness. He is not adverse.

Mr. Hoppe: No. Under Rule 43, objected testimony may be received for the purpose of making a record.

The Court: All right. Go ahead.

Mr. Hoppe: The following questions are submitted under Rule 43:

Q. Mr. George, before this meeting on June 10, had Mr. Towle given you any instructions with regard to the payment of future deliveries of the turkey logs?

A. You mean on August 10?

Q. August 10th. Pardon me.

A. He had not given me any specific instruc-

(Testimony of Fred George.)

tions. None, I think, until the evening of the 9th. The evening of the 9th of August, he did.

Q. What were the instructions you were given on the evening of the 9th?

A. They were given me by Mr. Towle after he had determined [57] that he would not be present, definitely determined that he would not be present for the meeting of the morning of the 10th.

* * *

Q. Would you go on, Mr. George?

A. Mr. Towle called me in my room and said that he had received the weather report and that he and Mrs. Towle would be taking off early the next morning, that he would not be in the meeting with Mr. Beyers; and, as I recall, he asked me to come down to his room, and his instructions to me were that after the check was received which Mr. Adams had indicated to both Mr. Beyers and Mr. Towle, as I understand it, was in the mail, after that check was received that I was to make sure that there was an understanding that the balance of the inventory would be handled on an SDBL basis.

Mr. Hoppe: That is all. That is the end of my redirect examination.

The Court: Any further cross-examination?

Mr. Ruff: One question, your Honor.

(Testimony of Fred George.)

Recross-Examination

By Mr. Ruff:

Q. In your direct testimony, you related that the conversation which took place in your meeting of August 10th [58] in Mr. Beyers' office, at which time Mr. Adams was present was as follows: You said that Mr. Adams and Mr. Beyers were in there with you, that Mr. Adams had received a check of over \$50,000, that he gave it to Mr. Beyers, stating that it would about bring them up to date in his opinion; that Mr. Beyers then sent the check out and that Mr. Beyers then told Mr. Adams that on future deliveries there would be sight draft bill of lading, and that Mr. Adams said that he thought that could be handled because they had just completed financing in Chicago. Now, that was your direct testimony with regard to the conversation at that meeting? A. Yes.

Q. That is to the best of your present recollection all of the conversation that took place at that meeting; is that correct?

A. The only other conversation that took place was very short in regard to Mr. Adams' request, I believe, for some letters to be written and Mr. Beyers dictated the letters.

Q. You said nothing at that time about any sight draft bill of lading?

A. No, sir. I didn't. [59-61]

Afternoon Session, 1:30 o'Clock P.M.

* * *

GEORGE J. TOWLE

called as a witness by the plaintiffs, being first duly sworn, thereupon testified as follows:

* * *

Direct Examination

By Mr. Hoppe:

Q. Mr. Towle, you are one of the plaintiffs in this action? A. Yes.

Q. And you are a citizen of the State of California? A. Yes, sir.

Q. I hand you Plaintiffs' Exhibits 6 and 7 and ask if you are one of the partners of the partnership referred to in that agreement?

A. Yes; I am.

Q. And I hand you Plaintiffs' Exhibit 4, and I ask if you are the George Towle referred to in that agreement? [62] A. Yes; I am.

Q. Referring to Plaintiffs' Exhibit 4, would you tell us whether that contract was entered into by you on your own personal behalf or on behalf of the partnership represented by Plaintiffs' Exhibits——

* * *

6 and 7.

* * *

A. Yes. I was acting in behalf of the partnership.

(Testimony of George J. Towle.)

Q. Mr. Towle, have you heard Mr. Fred George's testimony about the meeting in Salt Lake City on August 9th and 10th of 1954?

A. Yes; I did. [63]

* * *

Q. During that period of time, do you recall any instructions which you may have given Fred George concerning the payment of future deliveries of turkey logs? A. Yes.

Q. Would you please state the facts and circumstances of the instructions which you gave to Mr. George?

Mr. Ruff: If the Court please, I object to the question on the same grounds previously given with regard to the same—to Mr. George, on the ground it is hearsay.

The Court: Is this again one of the *res gestae* offers?

Mr. Hoppe: No. This is on the fact that in the defendants' cross-examination of Mr. George, they went into the duties which Mr. George had at this meeting on the 10th, and since the only person who could—the only way that the duties can be determined is by knowing what the relationship between the parties actually is, that in my opinion would be an exception to the hearsay rule.

Mr. Ruff: If your Honor please, that is the same [64] matter which we discussed before. That question of Mr. George was not with regard to what duties he had at that meeting of August 10th.

(Testimony of George J. Towle.)

I questioned him generally with regard to his relationship to the organization. This question seeks to do by indirection what cannot be done directly.

The Court: I think it is hearsay. I will have to sustain the objection.

Mr. Hoppe: May I have the answer under Rule 43, please?

* * *

The Witness: I had given Mr. George instructions, I guess you would say, or authority to speak to Mr. Adams. The next morning, that is the morning of the 10th, we had planned on leaving early. I didn't know whether—I didn't except to see Mr. Adams the next morning, because we were leaving immediately for the East, and I told Mr. George that when the check came in from Chicago that he should at that time inform Mr. Adams that future shipments would be on sight draft.

Mr. Hoppe: These, again, are under Rule 43-C, your Honor. [65]

The Court: Yes.

* * *

Mr. Hoppe: * * * Were you present at any time that such information concerning the sight draft was communicated to Mr. Adams?

Mr. Ruff: By Mr. George?

The Witness: By Mr. George?

Mr. Hoppe: By anyone.

A. By someone, yes.

(Testimony of George J. Towle.)

Q. When was that?

A. That was the next morning at breakfast.

Q. And who communicated this information to Mr. Adams? A. I did.

Q. What did you tell Mr. Adams?

A. After he showed me the check, I told him that we were very glad to have it, and that from now on, in the future, it would be paid—it must be paid for on sight draft.

Mr. Hoppe: And now I am going back off of Rule [66] 43-C, your Honor.

Q. Did you see Mr. Herb Beyers during the two-day period of August 9 and August 10 of 1954?

A. Yes; I did. [67]

* * *

Q. What time did you get to Salt Lake?

A. It was early in the afternoon of the 9th.

Q. When did you leave Salt Lake City?

A. We left about 9:00 o'clock on the morning of the 10th.

Q. During the period beginning in the morning on the 9th and ending in the morning on the 10th, did you make at any time during that period any statement to Mr. Beyers giving him—saying that he might extend credit to Towle Food Products Company or words to that effect? [68]

* * *

The Witness: Not that I recall.

Q. (By Mr. Hoppe): When did you first learn that Mr. Beyers or the defendant Norbest Turkey

(Testimony of George J. Towle.)

Growers Corporation did [69] extend credit to the Towle Foods Products Company?

A. About the 22nd of October. * * * 1954.

Q. * * * did you have any conversations with anybody of Norbest Turkey Growers Association or have any correspondence with them between August 10th and October 24th?

A. No. No contact.

Q. I note that the name of your company on some of these invoices is given as the Towle Manufacturing Company, and that there is a company in Chicago by the name of Towle Food Products Company. Would you state the identity of those two concerns?

A. The Towle Manufacturing Company is my own corporation in Walnut Creek, and the Towle Food Products Company is an Illinois corporation. That is the Hart group.

Q. And that is the name of the corporation that was once known as the Turkey Log Corporation?

A. Yes.

* * *

Mr. Hoppe: Your Honor, we offer in evidence as Plaintiffs' Exhibit 16-A—we are taking this out of order [70] so it will appear in a logical place—a statement of account of Towle Manufacturing Company dated September 21, 1954.

* * * prepared by Norbest Turkey Growers Association.

* * *

(Testimony of George J. Towle.)

The Court: It will be admitted into evidence as Plaintiffs' Exhibit 16-A.

* * *

Mr. Hoppe: Plaintiffs rest, your Honor. [71-80]

* * *

GEORGE TOWLE

recalled as an adverse witness by the defendants, having previously been duly sworn, thereupon testified as follows:

The Court: He is being called as an [81] adverse witness under the original Rule 43-B?

Mr. Ruff: That is correct.

The Court: You may cross-examine upon any subject relative, because you are not limited by any direct examination.

Cross-Examination

By Mr. Ruff:

Q. Mr. Towle, after you left Chicago, or Salt Lake City, on the morning of August 10, did you then go to Chicago? A. No, sir.

Q. You went straight to New York?

A. No, sir.

Q. When did you arrive in New York City?

A. We arrived in New York City on the—three days elapsed. That would be the 12th.

Q. On the 12th?

A. The 12th of August.

Q. After you arrived in New York City, you

(Testimony of George J. Towle.)

wrote a letter to Mr. Clarence Betz, who was your accountant, did you not? A. Yes.

Q. And Mr. Betz was handling matters for you in your absence, was he not, with regard to this Norbest affair?

A. He was handling matters in regard to the bookkeeping, and regarding checks, receiving checks, and paying checks. [82] My secretary at the office took care of correspondence. The correspondence and general office.

Q. But, he was handling the financial end of the Norbest transaction?

A. Yes. Just a minute. With one exception. The checks that would come in would be deposited by my secretary.

Q. Yes, but he is the one who looked at them, verified them and checked the amount and that type of thing? A. Yes.

Q. Now, you wrote Clarence Betz on August 12 from New York City with regard to the meeting that you had had with Norbest and Adams, did you not? A. Yes; I did.

Q. I will hand you this letter and ask if that is the letter you wrote to Mr. Betz?

A. That is the one.

Mr. Ruff: I ask that this be introduced as next in order.

The Court: All right. Defendants' Exhibit A will be admitted.

* * *

Q. (By Mr. Ruff): In this letter you state:

(Testimony of George J. Towle.)

“Dear Clarence: Had a visit with Norbest, [83] Adams of Towle Food Products in Chicago on Monday”——

You say you weren't in Chicago? A. No.

Q. Is the letter in error in that respect, that it says you had the meeting in Chicago on Monday?

A. It is.

Q. What should “Chicago” be in this letter, “Salt Lake”? A. “Salt Lake.”

Q. You then go on to say:

“Tuesday Adams was to give Norbest a check for all our unpaid invoices to Norbest at \$1.05 per pound.”

That you knew because of the conversations you had in Salt Lake; is that correct? A. Yes.

Q. You go on to include your estimate of what you owe Norbest at 99 cents up to and including the invoice 1858, which he gave you, and 2862, which I do not believe you had received.

“Towle Food Products still owes for four invoices.

“I have boxed the enclosed, which Norbest is not billing them for, as we have paid them.”

Now, that portion of the letter relates to certain earlier invoices that you had sent to the Chicago group, does it not?

A. That is true. [84]

Q. And for which you had not been paid?

A. Yes.

Q. And which Norbest was not going to bill Chicago for? A. Yes.

(Testimony of George J. Towle.)

Q. Adams said he would include them in his check to Norbest? Is that what that check is, that \$50,000 check that Adams gave to Norbest in Salt Lake? A. I don't know.

Q. You don't know what that had reference to?

A. No; I don't.

Q. Would reading the letter help you a bit?

A. No. I read it over before. I still can't—don't know what he is referring to, what check he was referring to.

Q. You then go on to say:

“Please check this when you get the receipt and statement from Norbest. If not paid, send them a statement.”

By saying “send them a statement,” you refer to Chicago, do you not? A. Yes.

Q. Not Norbest. Then you go on to say: “T.F.P. Inc.”——

The Court: What is T.F.P. Inc.?

The Witness: That is Towle Food Products, Inc., Chicago.

Q. (By Mr. Ruff): That is Chicago? [85]

A. Yes.

Q. “T.F.P., Inc., have also agreed to be invoiced and pay for some 80,000 and pay up by August 20. We should receive our check from Norbest shortly after.

“Fred George will be in touch with you and can explain anything regarding our understanding. Had great trip”—et cetera.

Now, the understanding, the agreement that was

(Testimony of George J. Towle.)

arrived at when you were in Salt Lake was as it is expressed in this letter, is it not, that Chicago would be invoiced for the balance of this commodity, for these 80,000 pounds, and that they would then pay up on the invoices by August 20. Now, that is what the understanding and the agreement was in Salt Lake, was it not?

A. There is something inconsistent in that letter.

Q. Well, you wrote the letter.

A. I know. I know, but there is something inconsistent there, because——

Q. Now, before you start answering that, just answer my first question. This is the agreement that you arrived at in Salt Lake, was it not, that the Chicago people would be invoiced by Norbest and they would pay up the invoices?

A. My recollection, Mr. Ruff, is that at the time——

Q. You can answer that, Mr. Towle, yes or no, and then [86] explain your answer if you wish.

Mr. Ruff: I ask that the witness be instructed to do so, your Honor.

Mr. Hoppe: If you can't answer with a yes or no answer——

The Court: I was going to say, he may or may not be able to answer it yes or no. If he can't, he certainly can explain, but I want you to give as direct an answer as possible. Then, you can explain. Do you understand the question?

The Witness: Yes, but I think I have to—let me say it this way: I don't remember. I don't re-

(Testimony of George J. Towle.)

call that I was aware of an extension of time to the 20th of August. Now, as I say, that is something inconsistent with my memory. Now, how to account for it, I don't know. I say Chicago in there when I obviously meant Salt Lake.

Q. (By Mr. Ruff): You say you don't understand that because you don't recall that you were aware of an extension of time to August 20? On your direct testimony my recollection is that you stated that you had not communicated with anybody from Norbest after you left Salt Lake on August 10th?

A. To the best of my recollection I did not correspond with anybody from Norbest.

Q. Nor did you communicate with anybody from Chicago; is that correct? [87]

A. To the best of my knowledge. I can't say. That is what I believe is inconsistent in something there or something I said. Now, I can't explain it, Mr. Ruff.

Q. Well, you wouldn't have said it unless you had known it, would you?

A. No. Well, I don't know how I could, because I had left by the time Mr. Beyers and Mr. George and Mr. Adams wrote that letter, or whoever wrote the letter. I guess it was Mr. Beyers.

Q. You didn't create it out of whole cloth, did you, when you put it in this letter? It is not a fabrication?

A. I don't think so, but I can't account for it.

Q. Well, passing the matter of the extension of

(Testimony of George J. Towle.)

time, the fact of the matter is that the agreement and understanding that was arrived at in Salt Lake is that the Chicago people would be invoiced by Norbest and they would pay on the basis of these invoices?

A. Well, yes, but when you invoice, invoice and pay for by a date, I think that is significant of probably—aside from a C.O.D., a sight draft, a C.O.D.

Q. That is not my question. My question is that it was the understanding that the Chicago people would be invoiced; isn't that correct?

A. Yes.

Q. All right. That was the understanding, that they [88] would be invoiced.

Mr. Hoppe: You haven't read the whole sentence to the witness, counsel.

Mr. Ruff: I am not referring to the letter. I am asking the man about his understanding, which, I assume, on August the 12th, two days after the meeting, would be much better than his present recollection.

Q. You would agree to that, wouldn't you?

A. I would.

Q. And the understanding was that they would be invoiced.

Now, there was no agreement, was there, with regard to any sight draft billing?

A. No agreement between Norbest and myself?

Q. Correct.

(Testimony of George J. Towle.)

A. No. You are referring to a written agreement?

Q. A written or oral.

A. I can't answer that. I don't recall.

Q. You don't recall?

A. I don't recall there was anything oral, and I am—I know there is no written agreement. I am sure.

Q. In other words, there was no written agreement between yourself and Norbest with regard to the sight draft billing, that you are sure of?

A. Nothing written.

Q. All right. Now, with regard to the oral part of it, [89] you just don't know; is that your testimony?

A. Well, I don't recall.

Q. You don't recall whether there was or whether there wasn't?

A. No.

Q. You recall your deposition was taken on April 22nd, 1958, do you, Mr. Towle?

A. Yes.

Q. I will ask you to refer to the deposition. It is Page 47, Lines 13 through 19.

Starting right here, Line 13 down through Line 19, I will ask whether or not this question was asked and this answer given:

“Mr. Ruff: That is not my question of you, Mr. Towle. My question is that it is recited in your letter of August 12th to Mr. Betz the understanding was simply this, that charge would be invoiced and they would make payment for the billing of this material by August 20th, and that was the extent of the understanding. There was no agree-

(Testimony of George J. Towle.)

ment that there was going to be any sight draft billing? A. No agreement, no."

Now, that was your answer, wasn't it?

A. Yes.

Q. And that is your present testimony, isn't it, that [90] there was no agreement of any kind that there was going to be any sight draft billing, either oral or written?

A. Well, you asked me, I think, if there was anything—I explained that there was no agreement written. As to the oral, I said I don't recall.

Q. Now, I am asking whether you wish to change the testimony that you gave in your deposition? A. Well, I don't refer to any oral——

Q. I don't refer to anything. I simply say there was no agreement that there was going to be any sight draft billing, and your answer is:

"A. No agreement, no."

The Court: The question is: Do you want to change that, or is there an explanation for it?

The Witness: Well, I don't know how to answer it.

The Court: Let us parse it first. Do you want to change what you said? Is there anything to change as far as you know, any additions, alterations?

The Witness: I would say there was no written agreement. As to oral agreement, I can't answer.

Mr. Ruff: All right. You can't answer.

Q. When you returned from Europe and saw Mr. Beyers, and you did see Mr. Beyers on your return from Europe, did you not?

(Testimony of George J. Towle.)

A. Yes; I did. [91]

Q. That was in October, was it?

A. Yes; the latter part of October.

Q. Do you recall the date when you saw Mr. Beyers?

A. Approximately the 26th, or close to it.

Q. Where did you see Mr. Beyers?

A. In Salt Lake.

Q. And you made it your business to go see Mr. Beyers because of the fact that you understood that he had some difficulty in collecting the billing of this money, is that correct?

A. Well, two reasons. It was a normal stop between St. Paul and California. I stopped many times.

Q. You found out about the fact that this money hadn't been collected when you arrived in New York on October 22nd; is that correct?

A. Yes.

Q. You had some letter there waiting for you, is that it? A. Yes; that is true.

Q. When you saw Mr. Beyers in October in Salt Lake City, did you at that time say anything at all to him about the lack of sight draft billing, or about their being no sight draft billing, or about his having failed to bill sight draft or anything of that sort?

A. Well, this is going to sound rather strange, but I don't recall any conversation at all. I remember seeing Mr. [92] Beyers in his office. What we talked about, I haven't any idea.

(Testimony of George J. Towle.)

Q. I refer you to Page 80 of your deposition, at Lines 18 through 25, which represents questions being asked of you by your own counsel, Mr. Hoppe, and I also refer you at the same time to Page 81, Lines 21 through 25, and ask whether or not these questions were asked and these answers given:

“Mr. Hoppe: Now, you were asked whether you discussed the question when you saw Herb Beyers on your return from your trip to New York to Europe when you dropped in to see Mr. Herb Beyers. You were asked whether you discussed the question of the sight draft bill of lading matter with Herb at the time and you said that you didn’t recollect?”

“A. I don’t recollect.

“Q. Do you recollect if Mr. Beyers discussed it with you?”

“A. I don’t recollect any conversation about that at all.”

Page 81, Line 21, again by Mr. Hoppe:

“Q. Do you recall, try to think whether the sight draft bill of lading was discussed at all by anybody at that meeting on your return from your trip to Europe?”

“A. I guess I have just strained my [93] memory a little bit too much.”

Do you recall those questions being asked and those answers given? A. Yes.

Q. Do you wish to change your testimony as represented at Line 25, Page 80. that you don’t recollect any conversation about that at all?

(Testimony of George J. Towle.)

A. I don't believe I quite understand, Mr. Ruff. What is it you want me to answer?

Q. Your testimony here on the stand has been that you don't have any recollection of any of the conversation with Mr. Beyers.

A. Well, isn't that what I say here?

Q. Not as I read it, Mr. Towle.

Mr. Hoppe: I read it that way here. I think it is perfectly consistent.

The Court: That is the point now. It seems to me you have made your point.

Mr. Ruff: I will pass, your Honor.

Q. Now, you also had a meeting with Mr. Hart in Chicago, did you not? In November of 19——

A. Yes.

Q. Of 1954? A. Yes; I did.

Q. And I assume that the purpose of that meeting was [94] to attempt to make collection of that amount of money that you claimed to be owing to you; is that correct? A. That is true.

Q. This amount of money that you claim to be owing to you represents simply the 10-cent profit that you expected to make on these turkey logs, doesn't it? A. Yes. [95-97]

* * *

Q. At the time of your conversation with Mr. Hart in Chicago, did you at all discuss with him the matter of sight draft bill of lading and the failure to sight draft or anything of that sort?

A. I don't recall that.

(Testimony of George J. Towle.)

Q. You don't recall whether you did or not, or you don't recall that you did, which?

A. Is there a difference?

Q. Yes, there is a difference.

The Court: You can have a failure to recollect something completely, or you can remember that that was not the case. That is the point.

The Witness: Well, my recollection is that I don't recall having discussed it.

Q. (By Mr. Ruff): All right. Now, as a matter of fact, is it not so that so far as the Norbest people are concerned and any liability on their part, this was purely an afterthought so far as you were concerned, was it not?

A. Which, Mr. Ruff?

Q. Any liability on the part of Norbest or responsibility on the part of Norbest. It was an afterthought after you found out that you couldn't get the money from Hart? [98]

A. I don't—I wouldn't say that it was an afterthought, no.

Q. You would not say that it is an afterthought?

A. No. I think it is perfectly logical that we attempt to get the money from Mr. Hart, first, because he is the one that bought the turkey logs.

Q. I refer you again to the deposition, Page 75, Line 26, through Page 76, Line 6.

A. Page 77?

Q. Page 75. A. 75.

Q. The last line, Line 26, and Page 76.

A. Through Line 8?

Q. Yes. In part.

(Testimony of George J. Towle.)

“Q. In other words, this matter of some responsibility on the part of Norbest was, so far as you were concerned, an afterthought after you found that you couldn’t get the money from Hart?

“A. You say me individually or my attorney?

“Q. You individually.

“A. (No response.)

“Q. You have the question?

“A. I answered, didn’t I?

“Q. No. [99] A. I said ‘Yes.’

“Q. I am sorry. I didn’t hear you.

“A. On the advice of attorney.”

Now, it is the fact that so far as you individually are concerned that the matter of any responsibility on the part of Norbest is an afterthought when you found you couldn’t get the money from Hart?

A. I am trying to justify the “afterthought” part of it.

The Court: Mr. Towle, you don’t have to get into a semantic argument on this thing.

The Witness: I am not trying to.

The Court: I think what you are attempting to do is to argue it with Mr. Ruff. I don’t mean you are being in any sense arbitrary or contumacious about the thing, but in essence, your answer is an argument by trying to explain or by trying to argue about the word “afterthought.” You are perfectly at liberty to say what you meant by the use of the word “afterthought,” in your deposition if that is what you want to do. Now, is that what you are trying to do?

(Testimony of George J. Towle.)

The Witness: I think it is perfectly logical that we attempt to collect money from——

The Court: That is just an argument.

The Witness: Yes. [100]

The Court: In other words, that is something your lawyer can argue just as well as you can from the witness stand unless this goes to your frame of mind. In other words, if this was the reason for your doing something or for not doing something, you are perfectly proper to say that is the reason you had in your mind, but for you to say here and now that is the justification for your procedure as of now, that is an argument.

The Witness: I see.

The Court: The argument will be made by your lawyer. You don't have to do it.

The Witness: Well, I turned this over to my lawyer, and he was the one that made these procedures, and when he thought of it or when he decided to attempt to make collection from Norbest Turkey Growers, I don't know that it was an afterthought as far as he was concerned, or whether he planned all this in the first place. I am not in a position to say what he thought. I followed his instructions.

The Court: When you used the word "afterthought" in the deposition, did you mean that it was another method of collecting the money, since you were unable to collect it from Hart, or unwilling to attempt to collect it from Hart?

The Witness: I don't think that the term "after-

(Testimony of George J. Towle.)

thought'' is necessarily—how will I say that? I don't know. I am mixed up. [101]

Mr. Hoppe: I think if the whole question is read to the witness—You see, Mr. Ruff only read part of the question to the witness. What he did, he stated it first one way, and then he stated it in other words. I would like to read the whole question instead of just part of it.

The Court: Mr. Ruff, will you do it then?

Mr. Ruff: Where do you want me to start?

Mr. Hoppe: Right where it says:

“Q. He states in his letter”——

Mr. Ruff: I will start wherever you wish. Page 75, Line 19:

“Q. He states in his letter”——

And I may add parenthetically to explain this, Mr. Hoppe, the letter we are referring to as the letter which Mr. Stewart, the attorney for Towle, wrote to Norbest on September 1st of 1955.

Mr. Hoppe: Right.

Mr. Ruff: (Reading):

“Q. He states in his letter: ‘As you know, for approximately the past year we have made concerted efforts on behalf of Towle and George to collect from Towle Food Products,’ and I direct you to the last page of the letter, Page 4, stating in part: ‘We again assure you that reluctantly and only as a last resort that we impose [102] responsibility on you.’

“Q. My question, in other words, is this matter of some responsibility on the part of Norbest was so far as you were concerned an afterthought after

(Testimony of George J. Towle.)

you found that you couldn't get the money from Hart?

"A. You say me individually or my attorney?

"Q. You individually.

"A. (No response.)

"Q. You have the question?

"A. I answered, didn't I?

"Q. No. A. I said 'Yes.'

"Q. I am sorry. I didn't hear you.

"A. On the advice of attorney."

A. Well, I think I answered by saying that I was governed by my attorney, who was Edgar Stewart.

Q. But so far as you individually are concerned, you stated in your deposition it was an after-thought?

A. I think when a client starts thinking with his attorney, he is going to get in trouble. [103]

* * *

Redirect Examination

By Mr. Hoppe:

Q. That did not include the \$2680.67 boxed that you discussed in your letter with Mr. Betz, did it?

A. Which check?

Q. Mr. Ruff asked you whether the amount that you were going to try to collect from Hart in Chicago represented the 10 cents, or the 19,000 some-odd dollars, and you said something to the effect of "Yes." Did you intend to include in your answer the thought that you had abandoned your claim for \$2680.67 for which there is no check? [104]

(Testimony of George J. Towle.)

A. Oh, no. That was beside the issue.

Mr. Hoppe: That is all.

Recross-Examination

By Mr. Ruff:

Q. That had nothing to do, Mr. Towle, with your situation with Norbest at all? A. No. No.

Q. That was simply between you and Chicago?

A. Yes.

Q. All right. [105]

* * *

JOHN HERBERT BEYERS, SR.

called as a witness by the defendants, being first duly sworn, thereupon testified as follows:

Direct Examination

By Mr. Ruff:

Q. You are general manager of the defendant, known as the Norbest Turkey Growers Association, Mr. Beyers? A. I am.

Q. You were so acting as general manager in the year 1954? A. Yes, sir.

Q. Directing your attention, Mr. Beyers, to the date of August 10, 1954, do you recall on that date a meeting was had between yourself, Mr. Angelo Adams, and Mr. Fred George? A. I do.

Q. Where was that meeting held?

A. In my office in Salt Lake City.

Q. Were there any other persons present?

A. Our office manager, Mr. Paul Heinberg, was there part of the time. [106]

(Testimony of John Herbert Beyers, Sr.)

Q. Would you state what took place at that meeting, what was said by the parties at the time of the meeting?

A. We spent considerable time, and in various types of discussions as I remember. Mr. Adams presented us with a check which brought their account almost current, and as I remember, one of the things they had outstanding was a truckload of logs that was being currently delivered. A sight draft was requested on those, and in view of the fact that they couldn't clear through the bank, we put them on C.O.D. Because of the way the trucks move on this firm, we requested C.O.D., and they proceeded to make collections. I spent some time, as I recollect, talking with Mr. Adams about the situation and the problems of moving this merchandise by truck. Also, we spent some time talking about the tonnage which was in the warehouses in a number of places, * * * [107]

* * *

Well, we discussed where this merchandise was and how and when it was to be transferred, and as I remember, we put it down in writing. And from there we spent a little time discussing a possibility of a new product, or the manufacture of a new product of which his organization had a contract with us for the coming season.

Q. At any time during these conversations, and, I assume Mr. George was present at all times, was he not?

A. As I remember, Mr. George was present with Mr. Adams at that meeting.

(Testimony of John Herbert Beyers, Sr.)

Q. At any time during these conversations, did you tell Mr. Adams or state to anyone that on future deliveries or transfers to Chicago there would be a sight draft bill of lading? A. No, sir.

Q. Was there any discussion of sight draft bill of lading with regard to this material that was to be transferred to the Chicago people?

A. Not to my knowledge.

Q. And, I believe as I recall Mr. George's testimony, he stated that Mr. Adams asked you to write him a letter; is that correct?

A. That's right. I dictated the letter while they were in the office. [108]

Q. You dictated the letter while they were in the office? By that, you mean Mr. George and Mr. Adams? A. That's correct.

Q. Did Mr. George at any time during this meeting make any mention or say anything with regard to the sight draft bill of lading on the material to be transferred to Chicago?

A. Not to my knowledge.

Q. I will hand you this letter which has been introduced in evidence as Plaintiff's Exhibit 13 and ask you if this is the letter which you dictated in the presence of Mr. Adams and Mr. George in your office on August 10?

A. Yes, sir. That is the letter.

The Court: What letter is that? What exhibit?
Mr. Ruff: 13, your Honor.

Q. And this letter states in part, if I may quote:
"This letter is per our understanding in relation

(Testimony of John Herbert Beyers, Sr.)

to the agreement made between our organization and the Turkey Log Corporation of Illinois on May 25, 1954, in which there was a companion agreement that 190,000 pounds of turkey log now in stock was to be taken over by July 31, which was to be paid for by Mr. George Towle.

“We are amending this agreement to read that approximately 88,000 pounds stored in the Pacific Coast will be relabeled and paid for by Towle Food Products Company by August 20, except tonnage in Los Angeles, to [109] be paid for by August 25.”

Is that correct? A. That's correct.

Q. Now, did you later have a visit from Mr. George Towle in Salt Lake City during the latter part of October? A. Yes, sir.

Q. Do you recall what the date of that meeting was, approximately?

A. As I remember, it was October 27.

Q. Were there any persons present except yourself and Mr. Towle? A. No, sir.

Q. Would you state what you discussed at this meeting?

A. Mr. Towle, as I remember, discussed the fact that the moneys had not been paid to him by the Chicago corporation. He spent a little time pondering as to how best to go about collecting, and in the conversation, I told him that we were manufacturing one load for the Chicago corporation of which they had a markup of 10 cents a pound, or about some \$3,000. I stated that was being manufactured for Armour and Company, and he asked

(Testimony of John Herbert Beyers, Sr.)

if he might take over these funds. I called our attorney, and he said that in view of the contract that we had with the Chicago corporation, that if they wanted to take over the funds, that they should attach them, that they should file a formal attachment on them. I so told Mr. Towle when he [110] was in the office, but I did say that I would not pay over these funds unless they demanded the payment of them, and when he——

Q. By “they” you mean the——

A. The Chicago corporation. And when they made the demand, I would have to pay them. As I remember, they made the demand on November 17th, and they had not filed the attachment.

The Court: Chicago made the demand about November 17? And Mr. Towle had not filed an attachment?

The Witness: That is correct.

The Court: All right.

Q. (By Mr. Ruff): This \$3,000 sum owed, this had to do with a contract that you had with the Chicago people?

A. That is correct. However, I was hopeful that they could collect on this.

Q. In other words, minimize their damages to that extent? A. That’s right.

Q. Was there anything said to you by Mr. Towle in that conversation with regard to your failure to bill by sight draft bill of lading to Chicago, or anything relating to sight draft bill of lading to Chicago?

(Testimony of John Herbert Beyers, Sr.)

A. Not to my knowledge at that meeting.

Q. When did you first become aware from any source that Mr. Towle or somebody on behalf of him was making a claim against you, or your company, I should say, with regard to some alleged liability on your part relating to this Chicago transaction? [111]

A. As I remember, it was about a year later; and I believed it was in September, 1955, the corporation received a letter from Mr. Stewart.

Q. And that is Mr. Towle's attorney at that time? A. Yes, sir.

Mr. Ruff: No further questions of the witness at this time.

Cross-Examination

By Mr. Hoppe:

Q. Mr. Beyers, with reference to the funds that you had which were owed to the Towle Food Products Company, this approximately \$3,000, how did that happen to come into your hands?

* * *

A. Oh, that was based on a new contract that was written up in May of—early in the year, and I made the sale to Armour with their permission.

Q. With whose permission?

A. With the Chicago organization's permission with the write-up of 10 cents a pound of which they were to be credited with after the product was delivered.

Q. Was that a carload of turkey logs?

(Testimony of John Herbert Beyers, Sr.)

A. Approximately, yes. sir. [112]

Q. What was the selling price per pound on those turkey logs?

A. I don't remember the price, sir. We could go back to the report except that there was the override on it.

Q. Was it in the neighborhood of a dollar a pound?

A. Well, I would think about that. The market varied depending upon circumstances.

Q. Now, on the day that you received the demand from Hart for this \$3,000, you had had a telephone conversation with an attorney representing Mr. Towle up there, a Mr. Wood R. Horseley?

A. I don't remember. Someone called me there. However, there was a close proximity. However, I had mailed the check out, and the check was in the mail prior to the time that we received a call from him.

Q. And you received the call from him on the same day; is that right?

A. It was the same day in the afternoon or a day later. Now, I'm not sure about that.

Q. Was the date November 17, 1954?

A. I don't remember the date, sir. I remember someone called me and I told him that the check had been mailed, was in the mail.

Q. How long did you have that check in your possession prior to November 17, 1954? [113]

A. Well, it was approximately three weeks.

Q. You had the check for three weeks?

(Testimony of John Herbert Beyers, Sr.)

A. Yes.

Q. How long did you have the money in your hands?

A. What do you mean, the money?

Q. The \$3,000.

A. I had it all the time.

Q. When did you get your money from Armour for the turkey logs?

A. I suppose—We probably got it 10 days after it was billed, something like that.

* * *

At this time the defense rests.

The Court: Any rebuttal testimony [114]

Mr. Hoppe: No rebuttal.

The Court: All right. Then the evidence is closed.

Mr. Hoppe: The plaintiff rests.

* * *

[Endorsed]: Filed December 15, 1958. [115]

PLAINTIFFS' EXHIBIT No. 1

General Partnership Agreement Towle-George Turkey Log Company

This Agreement executed this 1st day of June, 1953, by and between Fred George (Hereinafter referred to as "George"), of Berkeley, California, and George J. Towle (hereinafter referred to as "Towle"), of Walnut Creek, California,

Witnesseth:

Whereas, George is the inventor of a product known as "Turkey Log" and is the owner of a fifty per cent (50%) undivided interest in an Application for U. S. Letters Patent for Turkey Product and Method of Preparing the Same, filed by Fred George in the U. S. Patent Office on January 3, 1950, as Application Serial No. 136,544; and an Application for Food Product and Method of Preparing the Same, filed by Fred George in the U. S. Patent Office on April 7, 1951, as Application Serial No. 219,845; and an Application for Canned Turkey Product and Method of Preparing the Same, filed by Fred George in the U. S. Patent Office on January 5, 1953, as Application Serial No. 329,665; and

Whereas, George and the Norbest Turkey Growers Association (hereinafter referred to as "Norbest"), contemplate the creation of a joint licensing program to be administered under an agency agreement with Stephen S. Townsend (hereinafter referred to as "Townsend"), the particulars of which have been fully disclosed to Towle; and

Whereas, George and Towle desire to associate themselves as partners for the purpose of promoting for profit the manufacture, sale and distribution of Turkey Logs (either in their original or some other form) produced by Norbest-George licensees, under the trade name of "Towle's Pioneer Turkey Log" or "Towle's Frontier Turkey Log," or such other trade names as may be deemed appropriate,

and of promoting the distribution of the said product in standardized commercial packages for such producers or processors thereof as may desire to participate in the partnership merchandising program, and for such other purposes as may be reasonably related to the foregoing; and

Whereas, the parties desire to define the terms of their association and to commit their agreement and understanding to writing,

Now, Therefore, intending to be legally bound hereby, the parties hereto hereby agree to associate themselves as co-partners under the laws of the State of California under the following terms and conditions:

I.

Name and Place of Business

1. The name of the partnership shall be Towle-George Turkey Log Company or such other suitable partnership name or names as the partners may from time to time mutually agree upon.

2. The principal place of business of the partnership shall be at the office of George J. Towle at 2710 Mt. Diablo Boulevard, Walnut Creek, California, and at such other localities within or without the State of California as may be agreed upon by the partners.

II.

Purposes of the Business

1. The partnership shall engage in the business of soliciting licensees under the Norbest-George li-

censing program hereinbefore mentioned and any other producers of said Turkey Logs, for the purpose of selling to such licensees or other producers the services of the partnership in the marketing and merchandising of said Turkey Logs. In connection therewith, it is anticipated that the partnership will make available distribution facilities, and will provide standardized commercial packages and advertising and product promotional services for such turkey log processors who may desire to avail themselves of the partnership's merchandising program. A charge for said services provided by the partnership will be made to all processors participating in the said merchandising program.

III.

Capital Investment Accounts and Withdrawals

1. George and Towle will advance from time to time, the funds necessary to cover the current expenses of the partnership. The capital contributions of each partner shall consist of the funds so advanced by each partner. Each partner shall be entitled to reimbursement from the assets and net profits of the partnership for funds so advanced, and may withdraw the same at any time and from time to time, and no salaries or profits shall be paid or distributed until said advances have been repaid in full.

IV.

Profits and Losses

1. The net profits or net losses of the partner-

ship shall be distributable or chargeable, as the case may be, to each of the partners equally.

2. An individual income account shall be maintained for each partner. Profits and losses shall be credited or debited to the individual income accounts as soon as practicable after the close of each fiscal year, and may be withdrawn from time to time as the condition of the business warrants.

V.

Management; Salaries

1. Each of the partners shall have an equal voice in the management and conduct of the partnership business. In the event of conflict, however, it is understood and agreed that the decision of Towle on merchandising and distribution questions shall prevail and the decision of George on processing and production questions shall prevail. Each partner shall devote his full time and attention to the partnership business, it being understood, however, that time devoted to the Norbest-George licensing program shall, for the purposes of this agreement, be deemed time devoted to partnership business, and provided further, that the parties recognize that Towle is engaged in other business through the Towle Manufacturing Corporation and may devote such of his time to the same as shall not interfere with his obligations and responsibilities hereunder. Each partner shall receive such salary as shall from time to time be agreed upon, but during such time as both partners shall have equal liabil-

ity for obligations of the partnership the payment of salaries shall be an obligation of the partnership only to the extent that there are partnership earnings and assets available therefor and shall not be an obligation of the partners individually. Salaries shall be treated as expenses of the partnership in determining net profits or net losses. If at any time and for any reason (including the death, retirement, insanity or disability of any partners), the partners shall devote substantially disproportionate amounts of their time to the partnership business, the partners shall be compensated by adequate salaries in proportion to the time devoted by each to the business of the partnership, and such salaries shall be treated as partnership expenses.

VI.

Dissolution

By the provisions of this paragraph the parties intend to establish their respective rights and duties and the rights and duties of their respective successors, in the event of the dissolution of this partnership by the mutual agreement of the partners, by the withdrawal of one of the partners, or by the death or incompetency of one of the partners.

For the purpose of dissolution resulting from the withdrawal of one of the partners, the value of the partnership shall be the net worth of the partnership at the close of the calendar month next preceding the month in which notice of desire to withdraw is given (as hereinafter set forth), plus an

amount equal to five times the average annual net profits of the partnership during the five-year period preceding the close of said preceding calendar month, or during such shorter period as the partnership may have been in existence. In the computation of net worth, no value shall be attributed to good will, going concern values, or similar intangibles.

For purposes of computing such net profits, and irrespective of salaries actually paid to the partners, the net profits earned during such period as disclosed by the books of the partnership, shall be adjusted so as to include as an expense deductible therefrom reasonable compensation to the partners for their services to the partnership during the computation period. In this connection, it is agreed that reasonable compensation for the services of each of the partners shall be assumed to be the sum of \$1,000 per month, or 50% of the net profits of the partnership computed without regard to partner's compensation, whichever is lower.

1. Dissolution by mutual agreement. In the event the partners mutually agree to dissolve the partnership, neither of the partners shall have either rights or duties paramount to the other and each of the partners, forthwith upon their agreement to dissolve, shall proceed diligently to effect the complete liquidation and the winding up of the partnership business and affairs. Subsequent to the agreement of dissolution the partnership shall accept no new or additional business, and with

the greatest dispatch the obligations of the partnership shall be paid and the remaining assets shall be divided in cash or in kind equally between the partners. For the purpose of these computations all moneys in the income and capital accounts of the partners and all amounts due to the partners for earned or unpaid salaries shall be considered obligations of the partnership and shall be paid to the partners respectively entitled thereto.

2. Dissolution by withdrawal. Dissolution by withdrawal shall not be deemed to include the retirement of a partner without intent thereby to cease to be a partner, but, to the contrary, shall be deemed to include only a withdrawal with intent to cease to be a partner.

In the event either partner for any reason desires to withdraw from the partnership, he shall evidence his desire so to withdraw by giving to the other partner a notice in writing to that effect.

The partnership shall not be dissolved immediately upon the giving of such notice, but shall continue (unless the partners mutually agree otherwise) for a period of sixty (60) days after the date upon which said notice is given.

Subsequent to the giving of such notice, if the partners mutually agree during said sixty- (60) day period that the partnership should be dissolved in accordance with the provisions of subparagraph 1 hereof, the partnership forthwith, upon such mutual agreement, shall become and be dissolved

and thereupon shall be liquidated and wound up in accordance with said subparagraph 1.

In the absence of such mutual agreement, then during the first thirty (30) days of said sixty- (60) day period the partner receiving said notice shall have the option to buy the interest of the partner giving said notice for one-half of the value of the business established as hereinabove set forth, with such option to be exercised by giving to the other partner a notice in writing to that effect.

In the event such option is not so exercised, then the partner who previously gave notice of his desire to withdraw, as hereinabove set forth, shall have an identical option, during the remaining thirty (30) days of said sixty- (60) day period, to buy the interest of the other partner for one-half of said value of the partnership and such option shall be similarly exercised, to wit: by a notice in writing to the other partner.

In the event either of the last-mentioned options is exercised, then the partner exercising the same (who will be denominated the purchasing partner) shall become and be the sole owner of the partnership business and assets, subject, however, to his performance of the following acts:

(a) Upon the expiration of said sixty- (60) day period the purchasing partner shall pay to the withdrawing partner not less than twenty-five per cent (25%) of the purchase price.

(b) Likewise upon the expiration of said sixty-

(60) day period, the purchasing partner shall make and deliver to the withdrawing partner his note in the principal amount of the balance of the purchase price, payable in monthly installments of not less than five per cent (5%) of such balance. Such installment payments shall commence on the first day of the calendar month next succeeding the calendar month in which said sixty- (60) day period expires, and unpaid principal of said note shall bear interest at the rate of five per cent (5%) per annum. All payments made upon said note shall be applied first, to interest accrued and second, to unpaid principal, and said note shall provide that in the event legal action be instituted to collect the same the maker thereof shall pay to the holder such reasonable attorney's fees as may be fixed by the Court in which said action is instituted.

Upon dissolution of the partnership under this subparagraph 2, it is understood and agreed that the withdrawing partner shall not, without the consent in writing of the purchasing partner, for a period of five years thereafter engage in the business of the partnership in merchandising turkey logs under partnership trade names or through former partnership distributors, alone or in conjunction with any other person, partner or corporation. A violation of this covenant shall be deemed an act of unfair competition on the part of the withdrawing partner so attempting to utilize the assets or good will of the partnership business in conjunction with any other person after the dissolution of the partnership. The partners, each for himself, hereby

acknowledge that the purchasing partner would be irreparably damaged by such conduct and agree that the provisions of this covenant shall be enforceable by a decree of specific performance or injunctive relief restraining the breach of the provisions hereof.

Nothing herein contained, however, shall limit the right of the withdrawing partner after dissolution of the partnership to engage in the business of processing turkey logs, alone or in conjunction with others, and marketing the same for his or their own accounts so long as partnership trade names, merchandising or distribution facilities are not employed in conjunction therewith.

3. Dissolution by death or incompetency. In the event of the death or judicially declared incompetency of either of the partners, the surviving or competent partner (hereinafter referred to as surviving partner) forthwith shall become and be the sole owner of all business and assets of the partnership, whether tangible or intangible, subject, however, to all partnership liabilities, and subject also to his performance of the following acts:

(a) He shall pay to the proper representatives or successors of the deceased or incompetent partner all sums due from the partnership to the deceased or incompetent partner at the date of the death or declaration of incompetency on account of loans, advances, accrued salary, or undistributed profits. The payment of said items in the aggregate shall be made as follows:

An initial payment of not less than twenty-five per cent thereof on or before the first day of the third calendar month following the calendar month in which occurs the death or judicial declaration of incompetency, provided, however, that such initial payment shall not be due or payable until such time as the person or persons receiving the same have legally established their right to such receipt.

The balance shall be paid in monthly installments of not less than ten per cent of such balance, commencing on the first day of the calendar month next succeeding the month in which the initial payment above referred to becomes due and payable. Said balance shall be evidenced by a promissory note made and delivered by the surviving partner, providing for the payment of interest on unpaid principal of said note at the rate of five per cent per annum. All payments made upon said note shall be applied first to interest accrued, and second to unpaid principal, and said note shall provide that in the event legal action be instituted to collect the same, the maker thereof shall pay to the holder such reasonable attorney's fees as may be fixed by the Court in which such action is instituted.

(b) During an initial period of five years following such death or judicial declaration of incompetency, the surviving partner shall pay to the legally qualified representatives or successors of the deceased or incompetent partner a sum equal to fifty per cent of the net profits earned in the business during such period. The surviving partner

shall account for and pay such profits periodically, but at least as often as annually, and for the purpose of computing, accounting for and paying such profits, losses incurred during any part of said five-year period shall be carried forward, and profits for subsequent portions of said period shall be adjusted to reflect and take into account such losses, to the end and with the result that in the computation and payment of the aggregate sums payable under this subparagraph (b), there will be considered in the aggregate any losses sustained by the business during the entire period.

In recognition of the fact that the services of the deceased or incompetent partner would have been of value to the business, and, after the surviving partner becomes sole owner of the business, will have to be replaced at the expense of the business or performed by the surviving partner, it is agreed that during any period in which the surviving partner is required to make payments to the representatives or successors of the deceased or incompetent partner (including periods hereinafter referred to), the surviving partner may include as an expense of the business in computing the net profits thereof, a sum of \$1,000.00 per month as a salary to himself, and a further sum of \$1,000.00 per month (whether actually expended or not), as payment (either to the surviving partner or others) for services to the business which would have been rendered by the deceased or incompetent partner had he continued actively to participate in the partnership business.

(c) For a further period of five years following the expiration of the initial five-year period hereinabove referred to, the surviving partner shall continue to make payments equal to a share of the net profits of the partnership business to the persons entitled to and upon terms and conditions governing such payments for the initial five-year period, except that during said further five-year period such payments shall equal twenty-five per cent of the net profits of the business instead of the fifty per cent of such profits which are payable during said initial five-year period.

Upon the expiration of said further five-year period, the surviving partner shall have no further obligation of any kind to the deceased or incompetent partner or to the representatives or successors of the deceased or incompetent partner.

4. Indemnity. In the event of the dissolution of the partnership for any of the reasons hereinabove set forth, the surviving, remaining or competent partner shall assume and pay all obligations of the partnership, whether incurred prior or subsequent to the date of the death or withdrawal of the deceased or withdrawing partner, or the date of the declaration of the incompetency of the incompetent partner, and shall save harmless the deceased or withdrawing or incompetent partner, his heirs, administrators, successors and assigns from any and all claims or demands which may be asserted against them or any of them on account of the

partnership status of said deceased or withdrawing or incompetent partner.

VII.

Partners' Powers and Limitations

1. Notwithstanding any provision of paragraph V of this agreement, no partner may without the consent of the other partner:

(a) Incur any item of expense in the conduct of the partnership business in excess of \$500.00 except with the joint approval of both partners.

(b) Assign, transfer, pledge, compromise or release any of the claims of or debts due the partnership except upon payment in full or arbitrate or consent to the arbitration of any of the disputes or controversies of the partnership.

(c) Make, execute or deliver on behalf of the partnership any assignment for the benefit of creditors or any bond, confession of judgment, chattel mortgage, deed, guarantee, indemnity bond, surety bond, or contract to sell or contract of sale of all or substantially all of the property of the partnership.

(d) Lease or mortgage or convey any partnership real estate or any interest therein or enter into any contract for any such purpose.

(e) Pledge or hypothecate or in any manner transfer his interest in the partnership, except as specifically provided herein.

(f) Become a surety, guarantor, or accommodation party to any obligation.

VIII.

Miscellaneous

1. The partnership shall maintain in the partnership name a bank account or bank accounts in such bank or banks as may be agreed upon by the partners. All funds of the partnership shall be deposited in such account or accounts.

2. All notices provided for under this agreement shall be in writing and shall be sufficient if sent by registered mail to the last known address of the party to whom such notice is to be given.

3. The parties hereto covenant and agree that they will execute any further instruments and that they will perform any acts which are or may become necessary to effectuate and to carry on the partnership created by this agreement.

4. Financial records of all matters pertaining to the partnership shall be maintained fully and accurately, in accordance with good accounting practices, and at all times properly posted, and said records shall be kept available at all reasonable times for inspection by the partners.

5. This agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, successors, personal representatives and assigns.

In Witness Whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

/s/ FRED GEORGE.

/s/ GEORGE J. TOWLE.

[Endorsed]: Filed June 4, 1958.

PLAINTIFFS' EXHIBIT No. 2

Assignment of Interest in Royalties

This Agreement, made and entered into this 1st day of June, 1953, by and between Fred George (hereinafter referred to as "George"), of Berkeley, California, and George J. Towle (hereinafter referred to as "Towle"), of Walnut Creek, California,

Witnesseth:

Whereas, George and the Norbest Turkey Growers Association (hereinafter called "Norbest"), are each owners of a fifty per cent (50%) undivided interest in certain pending Applications for U. S. Letters Patent for Turkey Product and Method of Preparing the Same, filed by Fred George in the U. S. Patent Office on January 3, 1950, as Application Serial No. 136,544; and an Application for Food Product and Method of Preparing the Same, filed by Fred George in the U. S. Patent Office on April 7, 1951, as Application Serial No. 219,845; and an Application for Canned Turkey Product and Method of Preparing the Same, filed by George

in the U. S. Patent Office on January 5, 1953, as Application Serial No. 329,665; and

Whereas, George desires to assign to Towle a twenty per cent (20%) interest in the gross royalties received by him pursuant to the aforesaid patents, and

Whereas, George has fully disclosed to Towle pending negotiations with Norbest relating to a joint licensing program (hereinafter referred to as the "Norbest-George Licensing Program"),

Now, Therefore, in consideration of the payment by Towle of Five Thousand Dollars (\$5,000.00) to George, in cash, receipt of which is hereby acknowledged by George, George does hereby agree to pay to Towle twenty per cent (20%) of the gross royalties hereafter received by him or for his account, from or on account of any of the aforesaid patents. Gross royalties as used herein shall be determined before deduction of expenses of administration of the proposed Norbest-George Licensing Program or of the expenses of administration of any other patent licensing program to which George may hereafter become a party.

1. It is agreed that Towle shall share the expenses (not reimbursed by others) of solicitation by George of prospective licensees for the aforesaid patents to the extent of twenty per cent (20%) of the amount thereof, reimbursing George therefor upon satisfactory evidence of such expenses, and it is further agreed that George shall incur no expense on account of the foregoing in excess of the

gross royalties payable by George to Towle pursuant to the provisions of said original agreement, George does hereby agree to pay to Towle twenty per cent (20%) of the gross royalties hereafter received by him or for his account from or on account of any of the patents referred to in said original agreement. "Gross royalties" as used herein shall be determined in the same manner as the same are determined under said original agreement.

2. As consideration therefor, Towle shall pay to George the sum of five thousand dollars (\$5,000) cash and George hereby acknowledges receipt of such sum.

3. The participation of Towle in certain expenses referred to in paragraph numbered 1 of said original agreement is hereby increased to forty per cent (40%)

4. George agrees that he will diligently and promptly do any and all acts necessary or proper to cause payment of royalties to be made by every licensee under the licensing program referred to in said original agreement, whether any such licensee be producing for Governmental or civilian consumption or use. Any expense relating to the foregoing shall be deemed an expense of administration of a patent licensing program as referred to in the provision of said original agreement immediately preceding paragraph numbered 1 thereof. This is not to be deemed a guarantee by George of the collectibility of any royalty payment.

5. Except as modified or supplemented hereby, said original agreement shall continue in full force and effect.

Dated: December 31, 1953.

/s/ FRED GEORGE.

/s/ GEORGE J. TOWLE.

[Endorsed]: Filed June 4, 1958.

PLAINTIFFS' EXHIBIT No. 4

[Plaintiffs' Exhibit No. 4 is identical to Exhibit A attached to the Complaint and is set out in full at pages 14 to 16 of this printed record.]

[Endorsed]: Filed June 4, 1958.

PLAINTIFFS' EXHIBIT No. 5

Sales Agreement

This Agreement executed between Norbest Turkey Growers Association of Salt Lake City, Utah, hereinafter referred to as "Seller," and the Turkey Log Corporation of Illinois, of 179 North Michigan Avenue, Chicago, Illinois, hereinafter referred to as "Buyer";

In consideration of the agreements herein contained, the parties mutually covenant as follows:

1. Seller hereby agrees to sell to Buyer and Buyer to purchaser all Turkey Logs manufactured

for civilian use by Seller during the period of time from September 1, 1954, to February 1, 1955.

2. Seller agrees not to license or offer to license any persons, firms or corporations who have not already received such offers and who have not been accepted within one week from date hereof by Stephen S. Townsend, of San Francisco, California, Patent Attorney for Norbest. This restriction shall terminate January 1, 1956. Provided, however, that Seller may license such other and additional persons, firms or corporations as it may see fit for the manufacture of Turkey Logs for military consumption.

3. Buyer agrees to purchase 410,000 pounds of Turkey Logs during the period from September 1, 1954, to February 1, 1955, at the rate of not less than 100,000 pounds per month consecutively during such season.

4. Buyer agrees to pay to Seller at Salt Lake City, Utah for said Turkey Logs a sum equal to two and one-half times the live weight per pound paid for the turkeys used in said manufacture of Turkey Logs, plus 25c per pound for manufacturing. Shipment shall be made by Seller to Buyer in carload or truck load quantities, F.O.B. Seller's plant at Rio Linda, California. Payment shall be made by Buyer at date of warehousing or shipment upon the weights as shown by the invoice or sight draft with Bill of Lading attached.

5. In the event Buyer defaults in ordering or paying for the Turkey Logs as prescribed above,

Seller is given the option to either terminate this contract and its obligations hereunder or to resort to such other remedies as may be available.

6. Also, in the event of default in the performance of that certain contract executed between Seller and George Towle or Walnut Creek, California, this date, Seller shall likewise have the same option of termination.

7. [Paragraph 7 is cancelled.]

8. It is understood that Buyer's rights of sale and distribution of Turkey Logs shall be limited to the Continental United States and that this agreement must be accepted and approved by the co-owners of the patent rights relating to said Turkey Logs, to wit, Seller and Mr. Fred George. It is the agreement of the parties that Seller reserves the right to manufacture or license for manufacturing the said Turkey Logs for consumption by the military forces or for foreign consumption.

9. In the event of default of performance by either party, the defaulting party agrees to pay all costs of enforcement, including reasonable attorney's fees.

Dated, this 25th day of May, A.D. 1954.

NORBEST TURKEY
GROWERS ASSOCIATION,
Seller,

By /s/ J. R. GARRETT,
Asst. Manager.

/s/ PAUL F. LINDBERG,
Witness.

[Seal] TURKEY LOG CORPORATION
OF ILLINOIS,
Buyer,

By /s/ ROBERT L. GEORGE,
Secretary,

/s/ ANGELO ADAMS,
President,

/s/ L. EDWARD HART, JR.

/s/ G. J. TOWLE,
Witness.

Approval: .

The undersigned patent owners hereby approve
and ratify the within Agreement.

Dated, this 25th day of May, 1954.

NORBEST TURKEY
GROWERS ASSOCIATION,

By /s/ J. R. GARRETT,
Asst. Mgr.,

/s/ FRED GEORGE.

[Endorsed]: Filed June 4, 1958.

PLAINTIFFS' EXHIBIT No. 6

[Plaintiff's Exhibit No. 6 is identical to Exhibit B attached to the Complaint and is set out in full at pages 16 to 22 of this printed record.]

[Endorsed]: Filed June 4, 1958.

PLAINTIFFS' EXHIBIT No. 7

Agreement

Fred George and George J. Towle, co-partners doing business under the name and style "Towle Food Products Co." hereinafter called the partnership, and Turkey Log Corporation of Illinois, hereinafter called the corporation, agree:

That, Whereas, of even date herewith the parties hereto have entered into an agreement relating principally to the purchase and sale of "turkey logs" and the payment by the corporation to George J. Towle of certain royalties, and

Whereas, under the provisions of said agreement, it is required that in the event the corporation transfers its business or said agreement, then the corporation will require such transferee to agree in writing to continue to make to said George J. Towle all royalty payments referred to in said agreement.

Now, Therefore, in consideration of the execution of said agreement and in supplementation and modification thereof, it is agreed that in the event the corporation desires to transfer said agreement, or the business of the corporation relating to said

royalty payments, and in the event the proposed transferee is unwilling to agree to continue to make said royalty payments to said George J. Towle as provided in said agreement, then said George J. Towle will waive the above-mentioned provisions of said agreement requiring the transferee to agree in writing to continue to make such royalty payments; provided, however, that in consideration of such waiver the corporation shall pay to George J. Towle forthwith upon such transfer a sum equal to ten per cent (10%) of the total considerations paid to the corporation for such transfer, less any brokerage fees and necessary expenses in connection with such sale.

Dated: June 10th, 1954.

TOWLE FOOD PRODUCTS,
INC.,

An Ill. Corporation,
Successor to

[Seal]

TURKEY LOG CORPORATION
OF ILLINOIS,

By /s/ L. EDWARD HART, JR.,
Its President, and

/s/ LYDIA C. NIEMUTH,
Its Secretary.

/s/ GEORGE J. TOWLE,

/s/ FRED GEORGE,
D.B.A. Towle Food
Products Co.

[Endorsed]: Filed June 4, 1958.

PLAINTIFFS' EXHIBIT No. 8

July 22, 1954.

Norbest Turkey Growers Assn.,
Salt Lake City, Utah.

Att: Mr. Herbert Byers.

Dear Herb:

It is my understanding that on Saturday, July 10th, Ray Garrett and Ed Hart had a telephone conversation at which time your office agreed to some changes to paragraph 4 of sales agreement between Norbest Turkey Growers Association and George Towle. It is my understanding that the purchase of the 190,000 pounds of turkey logs involved in this agreement is to be extended from August 1st to some later date.

So that I may fully understand what changes have been made will you be kind enough to write me a letter outlining the terms of the purchase of turkey logs by the Towle Food Products, Inc. of Chicago.

Mrs. Towle and I are planning on leaving for Europe the first part of August by which time I had hoped that the agreement between your company and the Towle Food Products, Inc. of Chicago, and myself would have been completed. In as much as I will not be here at the termination of the contract it would help considerably if you would allow me to have the Towle Food Products Inc. of Chi-

cago, pay you direct rather than their paying me and me paying you. To simplify this, it would probably be easier if you were to invoice the Towle Food Products of Chicago, direct on the basis of \$1.05 a pound, F.O.B. Chicago, and crediting my account on the basis of \$.99 per pound with the \$.95 per pound retroactive figure to be credited at the proper time. You, in turn, could pay this office, Towle Manufacturing Co. of Walnut Creek, whatever credits accumulate where they will be deposited in my bank.

We will not be returning from Europe until the middle of October and I would like to have some satisfactory means of payment between our companies which I am sure you will be agreeable to.

Will appreciate your immediate consideration of this suggestion so that I can make my necessary plans.

Yours very truly,

TOWLE MANUFACTURING
CO.,

G. J. TOWLE.

GJT:egc

[Endorsed]: Filed June 4, 1958.

PLAINTIFFS' EXHIBIT No. 9

[Letterhead]

Norbest Turkey Growers Association
P. O. Box 1529 - Salt Lake City 11, Utah

July 30, 1954.

Mr. George Towle,
Towle Manufacturing Company, Inc.,
2710 Mt. Diablo Blvd.,
Walnut Creek, California.

Dear Mr. Towle:

In reference to your letter of July 22nd in which you ask me about the telephone conversation that Mr. Garrett and Mr. Hart had, I talked with Mr. Garrett about this, and it was our understanding that 100,000# of turkey log would be taken and paid for by July 31st. We are very anxious to get this all cleaned up, and while 190,000# should be cleaned up and paid for by the end of this month, I am willing to extend the date to August 10th for the billing to be completed.

We observe your request to bill at \$1.18 for less than carload and at \$1.15 for carloads. We will be glad to follow your instructions, and at such time as a credit accrues to you, we will forward the money to your organization at Walnut Creek, California.

I appreciate your calling me today, and I hope that the money on the turkeys now billed will be in

to us early next month. I would suggest that if the turkey logs are not all billed by the tenth, that they be transferred over and we will bill them to you.

In reference to new production, young toms will soon be available and we will no doubt be working on that as soon as the 190,000# is exhausted. Also, there is a possibility we might have a small amount of tonnage left over in Los Angeles which we will be happy to bill to you in the event it is wanted. Kindly advise me your request in billing the new production which we may start on before you return from Europe. I'll be happy to hear from you further next week.

Yours very truly,

/s/ HERBERT BEYERS,

General Manager, Norbest
Turkey Growers Association.

HB:AW

CC: Mr. M. H. Simonson,
3132 - 17th St.,
Sacramento, Calif.

[Endorsed]: Filed June 4, 1958.

PLAINTIFFS' EXHIBIT No. 10

August 3, 1954.

L. E. Hart,
Montgomery, Hart, Pritchard & Herriott,
120 S. La Salle St.,
Chicago, Ill.

Dear Ed:

I have just received a letter from Herb Beyers, a copy of which I am having made and enclosing with this letter.

There is one particular point I would like to call to your attention and that is paragraph three. You will note that Norbest are going to bill me on the 10th of August for all the Turkey Logs that have not been withdrawn. I know that you fully appreciate the position this puts me in so hope that you will be able to take care of this inventory because, as I have explained to you over the phone, I am simply not in a position to pay for this kind of merchandise without going through a lot of red tape. This would seem rather unnecessary at this late date so hope that you will be prepared to take care of my invoices.

My wife and I are leaving here on the 9th of August, flying to New York where we will leave on the 15th for Europe. We expect to be gone a couple of months or more so I have asked Norbest to bill you direct for me. Payment should be made to Norbest and they will credit my account accordingly. Also, Ed, any checks you send after receipt

of this letter should be made payable to Norbest Turkey Growers Association to credit Towle Mfg. Co.

I spoke to Ange on the phone last Friday and he mentioned the possibility of a conference with Norbest in Salt Lake. If you feel that this is necessary, and if it could be arranged to be there on Monday, August 9th, I could meet you there in the afternoon. We plan on leaving here around late forenoon and staying in Salt Lake that night anyway. So it would be desirable from my standpoint to sit in on any meeting you may have with Norbest relative to the present contract. Please advise me at once so that I will know whether or not anyone will be in Salt Lake on the 9th.

I have also asked Herb to make shipments on the basis on \$1.18 and \$1.15 for L.C.L. and full car shipments. If there are to be any changes in these prices please notify him.

I am advising Norbest that starting with new production you are to be billed direct and that the Towle Mfg. Co. is out of the picture in that respect.

I hope that you will do what is necessary to comply with the understanding with my letter from Herb. I think you can realize that I am in somewhat of an embarrassing position by not having to lived up to the terms on my contract with Norbest regarding payment of their invoices to me. In view of the extension of time it will be even

more embarrassing in the understanding between you and Ray Garrett as far as payment of these invoices is concerned. I would suggest that, if there is any possibility that you will not be able to pick up the invoices for the balance of the Turkey Logs, that you notify Norbest so that they would be in a position to dispose of any surplus inventory that you do not feel that you can sell, or that you would be willing to pay for.

I would like to have had all this cleared up before I leave on this trip but inasmuch as this seems to be impossible at this time, I hope that I can leave without having to be concerned over payment to Norbest.

We will be returning some time after the middle of October when, if we have time, I would like to stop in Chicago on the way to St. Paul where we intend to stop for a few days, and possibly have a visit with you.

With best regards,

TOWLE MANUFACTURING
CO.,

G. J. TOWLE.

GJT:egc

[Endorsed]: Filed June 4, 1958.

PLAINTIFFS' EXHIBIT No. 11

August 3, 1954.

Mr. Herbert Beyers,
Norbest Turkey Growers Association,
Salt Lake City 11, Utah.

Dear Mr. Beyers:

I wish to acknowledge receipt of your letter of July 30th.

I have just written Mr. Hart sending him a copy of your recent letter so that he will be fully appraised of the facts contained therein.

I also notified Mr. Hart that the invoicing would come from your office on the basis of \$1.05 a pound with payment to be made to Norbest Turkey Growers Association crediting the Towle Manufacturing Co.

I also suggested that in the outside possibility that he would not be in a position to pick up the balance of the Turkey Log inventory to advise you accordingly so that you could dispose of them prior to the new production. I don't think there is a possibility of this occurring but mentioned it to him in case they have had a change of plans since our conversation with Mr. Garrett.

Upon the completion of their disposing of the present inventory of 190,000 pounds and beginning with new production, please be advised that this latter business is between Norbest Turkey Growers Association and the Towle Food Products, Inc.,

and that the Towle Manufacturing Co. has no part in this arrangement. You will bill them direct and look to them for payment. I would suggest, however, that you do not go into any new production for them until they have fulfilled the terms of their contract with me, which was to dispose, or, in any event, to pay for the 190,000 pounds of logs that are now in existence. This, however, is up to you but might, and probably will have the desired effect in getting them to make full payment of the monies they now owe. A letter to Mr. Hart prior to your contemplated new production might be in order and do us both some good.

They intimated over the phone last Friday that a conference in Salt Lake might be desirable in the near future. I explained to Hart that I was leaving here on the 9th and could, if necessary, stop in Salt Lake for a meeting if he felt that a meeting was necessary. If I hear from him prior to our leaving I will advise you accordingly.

I have also advised Hart that from now on he will be billed direct by Norbest and not from this office.

I am sorry that I have to seem to be running off in the middle of business but I had fully expected that these negotiations would be completed by this time. Our plans have gone too far, the ticket purchases, reservation, etc., to change them now and hope that the burden that I have put on you people relative to invoicing and collecting will not be too

It appears we extended the time until August 10th for the billing to be complete and I am hopeful it can be worked out on this basis. In the event that we are unable to get the 190,000 pounds of logs billed and paid for within the allotted time, we see no alternative for us but to request the cancellation of the agreement which we made and which you are a party to.

We are very appreciative of the opportunity to clean up this lot but it must be delivered and paid for as previously stated as we wish to clean up the present inventory. I will look forward to seeing Mr. Adams in the hopes that everything can be cleared up satisfactorily.

Wishing you a good trip to Europe.

Sincerely yours,

/s/ HERBERT BEYERS,

General Manager, Norbest
Turkey Growers' Assn.

HB:jf

[Endorsed]: Filed June 4, 1958.

PLAINTIFFS' EXHIBIT No. 13

[Letterhead]

Norbest Turkey Growers Association
Salt Lake City 11, Utah
P.O. Box 1529

August 10, 1954.

Mr. A. Adams, Vice President,
Towle's Food Products Co.,
540 Lakeshore Drive,
Chicago, Illinois.

Dear Mr. Adams:

I am writing you this letter as per our understanding in relation to agreement made between our organization and the Turkey Log Corporation of Illinois on May 25th, 1954, in which there was a companion agreement that 190,000 pounds of Turkey Log now in stock was to be taken over by July 31, 1954, which was to be paid for by Mr. George Towle.

We are amending this agreement to read that approximately 88,000 pounds stored on the Pacific Coast will be relabeled and paid for by Towle Foods Products Company by August 20th, except tonnage in Los Angeles, to be paid for by August 25th.

It is also agreed that the signature of the Turkey Log Corporation becomes binding to the Towle Food Products Company in connection with agreement made with that firm whereby they agreed to

purchase 410,000 pounds of Turkey Log from September 1st, 1954, to February 1st, 1955, at the rate of not less than 100,000 pounds per month, at the formula developed at that time.

It is also understood that during the 1955 season that Norbest Turkey Growers' Association will agree to furnish approximately one million pounds of Turkey Log for the second season, this to be agreed upon by both parties by June 1st, 1955. This represents the understanding of Mr. Adams and the writer as of this date.

Yours very truly,

/s/ H. B.,

HERBERT BEYERS,

General Manager, Norbest
Turkey Growers' Assn.

HB:jf

[Endorsed]: Filed June 4, 1958.

PLAINTIFFS' EXHIBIT No. 14

August 11, 1954.

Mr. Fred George,
Rt. 1, Box 902,
Danville, California.

Dear Fred:

I appreciated the opportunity of visiting with you on the turkey log operation and your inquiry

about our relationship with Towle Manufacturing Company at Walnut Creek, California.

I wish to state that as soon as the turkey logs are all sold and paid for, which we hope to have completed prior to August 31st, our organization will remit to the Towle Manufacturing Company the amounts due them, which we are collecting here.

I am hopeful these funds will be in so we can close our records here prior to September 1st.

Yours very truly,

HERBERT BEYERS,
General Manager, Norbest
Turkey Growers' Assn.

HB:jf

[Endorsed]: Filed June 4, 1958.

PLAINTIFFS' EXHIBIT No. 15

September 28, 1954.

Mr. Clarence E. Betz,
Towle Manufacturing Co., Inc.,
2710 Mt. Diablo Blvd.,
Walnut Creek, California.

Dear Mr. Betz:

I am enclosing a copy of our accounting on turkey log and I wish to report that Mr. Simonson

and I had extended meetings with Mr. Hart of the Towle Food Products in Chicago.

Mr. Hart was fully informed of the proposition of our allowing a price of 95c to Towle Manufacturing Company and since he stated there was legal problems involved between Towle Food Products and Towle Manufacturing Company, he refused to pay anything but the net amount due, which we accepted on the account.

While we were acting as Agents for you, it is my own opinion that the officers of these two corporations should get together and settle these differences, as I personally believe there will be little or no opportunity for us to collect this for you.

Yours very truly,

HERBERT BEYERS,
General Manager, Norbest
Turkey Growers' Assn.

HB:jf

cc/Fred George.

cc/M. H. Simonson.

[Endorsed]: Filed June 4, 1958.

PLAINTIFFS' EXHIBIT No. 16

NORBEST TURKEY GROWERS' ASSOCIATION

Payments made by Towle Food Products Co. on Towle Mfg.
Co. Account

Date

7-26 Collections as follows:

On our invoice T-813 of 7-14-53	
J. Dennis Freeman & Son	
Bloomfield, Indiana	
300 Ctn. Tur-King 10,616—10	
at \$1.15	\$12,209.12
Universal Distributing Co.	
St. Louis Mo. 300 Ctn. Tur-	
King 10,493—7 at \$1.15	12,067.45
K & B Packing Co.	
Denver, Colo. 250 Ctn. Tur-King	
8,945—12 at \$1.15	10,287.61
Total	\$34,564.18

8-16 Collection as follows on our invoice T-855 of 8-5-54:

Delivered to Kansas Cold Storage	
Co., Wichita, Kans.	
200 Ctns. Tur-King 7,065—	
11 at \$1.18	8,337.49
300 Ctns. Tur-King 10,716—	
5 at \$1.18	12,645.22
Total	\$20,982.71

8-25 Draft on Towle Food Products,
Chicago, Ill. Our invoice T-907
covering Transfer at Oakland, Cal.

136 Ctns. Tur-King 4,940—	
1 at \$1.05	5,187.06
Our invoice T-924 covering Trans-	
fer at Los Angeles, Calif.	
698 Ctn. Tur-King 24,580—	
10 at \$1.05	25,809.66
Total	\$30,996.72

8-10 Payment by A. Adams in Salt Lake
with no detail as to invoices paid .. \$51,894.47

9-17 Payment received in Chicago from
Ed Hart to balance the Towle Mfg.
Co. account on Norbest books \$43,956.83

Note: On our invoice T-855 100 Ctn. 3601-13 at \$1.18 \$4,250.00
to be delivered to Snow & Co., Independence, Missouri
was refused and above was stored at Kansas Cold Storage
Co., Wichita, Kans. for Towle Food Products Co.

9-28-54

[Endorsed]: Filed June 4, 1958.

PLAINTIFFS' EXHIBIT No. 16-A

Towle Manufacturing Company Statement of Account

Date Billed	Shipped From	Inv. No.	Pounds	Price	Amount
5-25	Fulton-Chi	T-715	1732-8	.99	1,715.17
5-28	Fulton-Chi	T-724	250-3	.99	247.69
6-9	Fulton-Chi	T-734	143-11	.99	142.25
6-11	Fulton-Chi	T-743	177-8	.99	175.73
6-13	Fulton-Chi	T-753	36-1	.99	35.70
6-18	Fulton-Chi	T-761	317-15	.99	314.76
6-18	Fulton-Chi	T-763	349	.99	345.51
6-21	Fulton-Chi	T-770	537-14	.99	532.50
6-23	Fulton-Chi	T-773	420-7	.99	416.23
6-28	Fulton-Chi	T-777	1572-6	.99	1,556.65
7-6	B-R, Sacto	T-790	177-1	.99	175.29
Total			5714-10		\$ 5,657.48

Less Payments by
Towle Mfg. Co.,
Walnut Creek, Calif.

6-3	R-1249	1,715.17
6-11	R-1285	247.69
6-16	R-1305	317.98
6-23	R-1452	695.97
6-28	R-1369	948.73
7-18	R-1471	1,731.94

Total	5,657.48
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Balance	None
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7-7	B-R, Sacto	T-791	40,911-12	.99	40,502.63
7-12	Fulton-Chi	T-794	2,738-5	.99	2,710.92
7-12	B-R, Sacto	T-801	3,533-9	.99	3,498.23
7-13	Fulton-Chi	T-805	710-8	.99	703.40
7-14	B-R, Sacto	T-813	30,055-13	.99	29,755.25
7-14	B-R, Sacto	T-814	526-12	.99	521.48
7-21	Fulton-Chi	T-826	2,845-1	.99	2,816.62
7-26	Fulton-Chi	T-833	70-11	.99	69.98
7-31	Fulton-Chi	T-849	889-13	.99	880.91
8-5	B-R, Sacto	T-855	21,383-13	.99	21,169.97
8-6	Fulton-Chi	T-858	2,317-9	.99	2,294.39
8-9	Fulton-Chi	T-862	70-9	.99	69.86
8-20	Fulton-Chi	T-904	142	.99	140.59
8-20	B-R, Sacto	T-905	34,530-5	.99	34,185.01
8-23	Fulton-Chi	T-906	20,845-13	.99	20,637.36
8-23	Natl. Ice-Oakland				
		T-907	4,940-1	.99	4,890.66
8-30	Merch.-S.F.-(Strapping)				
		W-1240			2.70
8-25	L.A. Ice-L.A.				
		T-924	24,570-10	.99	24,324.92
8-25	Merch.-S.F.	T-925	925-5	.99	916.06
8-24	Fulton-Chi	W-1221	(Strapping, etc.)		185.89
9-13	Natl. Ice-Oakland				
		W-1318	(Strapping,)		27.00

Total	192,008-05	\$190,303.83
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Grand Total Pounds ..197,722-15

Less Payments by
Towle Food Products
Chicago, Illinois

7-26 (Lipsman-Fulkerson on T-813)	
R-1500	34,564.18
8-10 Check R-1562	51,894.47
8-16 (Lipsman-Fulkerson on T-855)	
J-2549	20,982.71
8-25 Draft R-1636	30,996.72
	<hr/>
Total	\$138,438.08
	<hr/>
Balance	\$ 51,865.75
Less Credit Memo 4c per pound on Tur-	
King purchases — 197,722# 15 oz.	
at .04	7,908.92
Payment 9-17-54, Towle Food Products,	
Chicago	43,956.83
	<hr/>
Balance 9-21-54	0

[Endorsed]: Filed June 4, 1958.

PLAINTIFFS' EXHIBIT No. 17

Towle Manufacturing Company, Inc.
2710 Mt. Diablo Blvd.
Walnut Creek, California

September 24, 1954.

Mr. Herbert Beyers, General Manager,
Norbest Turkey Growers Association,
P.O. Box 1529,
Salt Lake City, Utah.

Dear Mr. Beyers:

This will acknowledge receipt of your schedule

of frozen turkey shipments per your orders from George J. Towle, President of Towle Manufacturing Co. Shortly before he left on his trip last month, George and I went over the orders, etc., and he asked me in his absence to check over your schedule of shipments when received.

Can you tell me which invoices are covered by the following payments on your schedule:

34,564.18

51,894.47

20,982.71

30,996.72

43,956.83

George also informed me that in the event 190,000 pounds or more were shipped by you, Towle Manufacturing Co. would receive an additional credit of 4 cents a pound, making the cost to us of 95 cents a pound. In view of this, I presume that a check will be forthcoming from you for \$7,908.92 per your calculation on page 2 of your schedule.

May I hear from you at your convenience?

Yours very truly,

CLARENCE E. BETZ,

Secretary, Towle Manufacturing Co., Inc.

CEB:mc

[Endorsed]: Filed June 4, 1958.

PLAINTIFFS' EXHIBIT No. 18

[Letterhead]

Norbest Turkey Growers Association
P.O. Box 1529—Salt Lake City 11, Utah

August 16, 1954.

Kansas Cold Storage Co.,
Wichita, Kansas.

Gentlemen:

Please store in the name of Towle Food Products Company, 540 Lakeshore Drive, Chicago, Illinois, the 100 cartons of boneless turkey stored in your warehouse by Lipsman-Fulkerson Company.

Please bill Towle Food Products Company for the storage charges from the original storage date.

Yours very truly,

/s/ H. B.,

HERBERT BEYERS,

General Manager, Norbest
Turkey Growers' Assn.

PFL:jf

cc/Towle Food Prod. Co., Chicago, Ill.

cc/Towle Mfg. Co., Walnut Creek, Cal.

(Copy)

Norbest Turkey Growers Association
Salt Lake City, Utah

As Agent for Towle Mfg. Co., Walnut Creek, Calif.

Invoice Statement.

Date: Aug. 16, 1954.

To: Towles Food Products Co., 540 Lakeshore Drive, Chicago,
Illinois.

Shipment from Sacramento 8-3-54: 21,383-13 1.05 \$22,453.00

Less Payment received from Lipsman-Fulkerson for:

200 Ctns. 7,065-11 @ 1.18

300 Ctns. 10,716-5 @ 1.18

17,782# 20,982.71

Balance Due\$ 1,470.29

The balance of this load consisting of 100 Ctns. 3,601-13 was stored in Kansas Cold Storage Co., Wichita, Kan., for your account as the shipment was refused by consignee account of not agreeing to price.

[Endorsed]: Filed June 4, 1958.

DEFENDANT'S EXHIBIT A

Leaving N. Y. Sunday, 6:00 p.m. If you need me before.

[Letterhead]

The Waldorf-Astoria
Park and Lexington Avenues
49th and 50th Streets
New York 22

Aug. 12.

Dear Clarence.

Had a satisfactory visit with Norbest-Adams of Towle Food Prod. in Chicago on Monday.

Tuesday, Adams was to give Norbest a check for all our unpaid invoices to Norbest at 1.05 per lb.

Enclosed is our statement of what we owe Norbest at .99 up to and including the invoice T. 858 which I gave you and T. 862 which I do not believe I had received.

Towle Food Prod. still owe us for the four invoices I have boxed on the enclosed which Norbest is not billing them for as we have paid them. Adams said he would include them in his check to Norbest. Please check this when you get the receipt and statement from Norbest. If not paid, send them a statement.

T. F. P., Inc., have also agreed to be invoiced, and pay for some 80,000 lbs. and pay up by Aug. 20. We should receive our check from Norbest shortly after Fred George will be in touch with you and can explain anything regarding our understanding.

Had good trip. We took it easy, making three overnight stops.

Thanks for looking after things.

Regards,

/s/ GEO.

[Endorsed]: Filed June 4, 1958.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK
TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this court in the above-entitled case and constitute the record on appeal herein as designated by attorneys for the appellants:

Excerpt from Docket Entries.

Complaint.

Answer.

Memorandum for Judgment.

Findings of Fact and Conclusions of Law.

Judgment.

Memorandum of Costs with Notice of Taxing.

Objections of Plaintiff to Memorandum of Costs.

Motion to Review Taxation of Costs.

Order on Motion to Review Taxation of Costs.

Notice of Appeal.

Appeal Bond.

Order Extending Time to Docket Record on Appeal.

Order Extending Time to Docket Record on Appeal.

Appellants' Designation of Record on Appeal.

Reporter's Transcript of Trial Proceedings.

Plaintiffs' Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10,
11, 12, 13, 14, 15, 16, 17, 18, 19.

Defendant's Exhibit A.

In Witness Whereof I have hereunto set my hand
and affixed the seal of said District Court this 9th
day of January, 1959.

[Seal] C. W. CALBREATH,
Clerk;

By /s/ MARGARET P. BLAIR,
Deputy Clerk.

[Endorsed]: No. 16317. United States Court of
Appeals for the Ninth Circuit. George J. Towle
and Fred George, Individually and as Co-partners
Doing Business as Towle-George Turkey Log Com-
pany, Also Known as Towle Food Products Co., a
Partnership, Appellant, vs. Norbest Turkey Grow-
ers Association, a Corporation, Appellee. Tran-
script of Record. Appeal from the United States
District Court for the Northern District of Cali-
fornia, Southern Division.

Filed and Docketed: January 9, 1959.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 16,317

GEORGE J. TOWLE and FRED GEORGE, Individually and as Co-partners Doing Business as TOWLE-GEORGE TURKEY LOG COMPANY, Also Known as TOWLE FOOD PRODUCTS CO., a Partnership,

Plaintiffs-Appellants.

vs.

NORBEST TURKEY GROWERS ASSOCIATION, a Corporation.

Defendant-Appellee.

APPELLANTS' STATEMENT OF POINTS

Appellants, George J. Towle and Fred George, individually and as co-partners doing business as Towle-George Turkey Log Company, also known as Towle Food Products Co., a partnership, in accordance with Rule 17.6 of the Rules of the United States Court of Appeals for the Ninth Circuit, state that the points upon which they intend to rely on their appeal from the Final Judgment entered by the District Court on September 15, 1958, are as follows:

1. The District Court erred in ordering and adjudging that plaintiffs, George J. Towle and Fred George, individually and as co-partners doing

business as Towle-George Turkey Log Company, also known as Towle Food Products Co., a partnership, shall take nothing by reason of their complaint.

2. The District Court erred in ordering and adjudging that judgment is hereby awarded to defendant Norbest Turkey Growers Association against plaintiffs.

3. The District Court erred in ordering and adjudging that defendant shall have and recover its costs as against plaintiffs, and each of them, herein.

4. The District Court erred in concluding that defendant agreed to act as the gratuitous agent for plaintiffs for the purposes of shipment of turkey logs to, invoicing of and receipt of funds from Turkey Log Corporation of Illinois (Conclusion of law, III).

5. The District Court erred in concluding that defendant did not violate any of the terms of any understanding or agreement with plaintiffs either oral or written with regard to this agency and had full authority, express or implied, to act as it did with regard to this agency (Conclusion of law, IV).

6. The District Court erred in concluding that no credits ever accrued in favor of plaintiffs, or any of them, out of any moneys held or received by defendant in excess of the amounts owing by plaintiffs to defendant (Conclusion of law, V).

7. The District Court erred in concluding that there never was and there is not now owing any sum of money from defendant to plaintiffs in connection with any of the transactions which were the subject of this action (Conclusion of law, V).

8. The District Court erred in concluding that defendant Norbest Turkey Growers Association is entitled to have and to recover judgment in its favor and to recover its costs herein as against plaintiffs (Conclusion of law, VI).

9. The District Court erred in implying in Finding V that the only instances in which defendant made shipments were "those instances where the Illinois corporation specifically requested that shipment be made sight draft bill of lading" or "where the Illinois corporation had specifically requested sight draft shipment."

10. The District Court erred in finding that defendant "in all instances followed plaintiffs' instructions with regard to shipments and billing" (Finding V).

11. The District Court erred in finding that "it is not true that on or about this date any arrangement was changed as between plaintiffs or any of them and defendant" as found in Finding VI.

12. The District Court erred in finding that "it is not true that prior to August 6, 1954, or at any time plaintiffs or any of them gave instructions to defendant that shipment of turkey logs to the Illi-

nois corporation should be made only on a sight draft payable to Norbest or that on August 6, 1954, or at any time, defendant acknowledged any such instructions," all as is found in Finding VII.

13. The District Court erred in finding that "it is not true that at this or at any other time defendant agreed or reaffirmed that all shipments were to be on a sight draft bill of lading basis only," all is as found in Finding VIII.

14. The District Court erred in finding that the transfers referred to in Finding IX were "in accordance with its agreement with and instructions from the partnership and plaintiffs and not in violation of any of them."

15. The District Court erred in making Finding X.

16. The District Court erred in finding that "no credit at any time ever accrued to the plaintiffs for which a proper allowance has not been made" as found in Finding XI.

17. The District Court erred in imposing upon plaintiffs the burden of proof on the issue of whether credit could or could not be extended by the agent.

18. The District Court erred in sustaining objections to the following questions propounded to Fred George, on the ground that they were directed to hearsay so far as any instructions given by Mr.

Towle to Mr. George. Answers thereto were given and received under Rule 43 as follows:

“Q. Mr. George, before this meeting on June 10, had Mr. Towle given you any instructions with regard to the payment of future deliveries of the turkey logs? A. You mean on August 10?

“Q. August 10th. Pardon me.

“A. He had not given me any specific instructions. None, I think, until the evening of the 9th. The evening of the 9th of August, he did.

“Q. What were the instructions you were given on the evening of the 9th?

“A. They were given me by Mr. Towle after he had determined that he would not be present, definitely determined that he would not be present for the meeting of the morning of the 10th.

“Q. Would you go on, Mr. George?

“A. Mr. Towle called me in my room and said that he had received the weather report and that he and Mrs. Towle would be taking off early the next morning, that he would not be in the meeting with Mr. Beyers; and, as I recall, he asked me to come down to his room, and his instructions to me were that after the check was received which Mr. Adams had indicated to both Mr. Beyers and Mr. Towle, as I understand it, was in the mail, after that check was received that I was to make sure that there was an understanding that the balance of the inventory would be handled on an SDBL basis.”

19. The District Court erred in sustaining objection to the following questions propounded to George J. Towle, the answers being received under Rule 43:

“Q. Would you please state the facts and circumstances of the instructions which you gave to Mr. George?

“A. I had given Mr. George instructions, I guess you would say, or authority to speak to Mr. Adams. The next morning, that is the morning of the 10th, we had planned on leaving early. I didn't know whether—I didn't expect to see Mr. Adams the next morning, because we were leaving immediately for the East, and I told Mr. George that when the check came in from Chicago that he should at that time inform Mr. Adams that future shipments would be on sight draft.

“Mr. Hoppe: Were you present at any time that such information concerning the sight draft was communicated to Mr. Adams?

“Mr. Ruff: By Mr. George?

“The Witness: By Mr. George?

“Mr. Hoppe: By anyone.

“A. By someone, yes.

“Q. When was that?

“A. That was the next morning at breakfast.

“Q. And who communicated this information to Mr. Adams? A. I did.

“Q. What did you tell Mr. Adams?

“A. After he showed me the check, I told him that we were very glad to have it, and that from

now on, in the future, it would be paid—it must be paid for on sight draft.”

20. The District Court erred in failing to enter findings of fact substantially as pleaded in the complaint on file herein.

21. The District Court erred in failing to enter judgment in favor of plaintiffs against defendant herein.

/s/ CARL HOPPE,

One of the Attorneys for
Appellants.

Receipt of copy acknowledged.

[Endorsed]: Filed February 17, 1959.